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MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

MARCH 28 TO JUNE 1, 1914

JAMES M. REASONER
STATE REPORTER

VOL. 180

FIRST EDITION

CHICAGO
CALLAGHAN AND COMPANY
1915

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JANUARY TERM, 1914.*

MERO *v.* MICHIGAN CENTRAL RAILROAD CO.

1. APPEAL AND ERROR — COMMON CARRIERS — COMPARATIVE NEGLIGENCE—BRIEFS—PRACTICE OF SUPREME COURT.

   The instructions of the trial court, in a personal injury case, that the rule of comparative negligence had no application to a servant on a boat which was out of commission and was not in use for purposes of transportation at the time plaintiff was injured, eliminated that question from the case so that defendant appellant need not refer to the claim and ruling in its brief.

2. MASTER AND SERVANT—DIRECTED VERDICT—INCONSISTENT POSITIONS—EVIDENCE.

   Plaintiff's testimony being contradictory, and his stories of the manner of injury irreconcilable, the trial court erred in submitting the issue to the jury, permitting them to guess which story was correct, where under one set of facts plaintiff could not recover.

3. SAME—LIGHTING STAIRWAYS—ASSUMPTION OF RISK.

   Where an employee who had been cleaning boilers in a ship knew that no other men were present and the lighting system was not working, he assumed the risk of attempting to proceed down the hatchway or steps between decks in the dark after having an opportunity to discover its condition as to darkness.

Error to Wayne; Mandell, J. Submitted April 16, 1913. (Docket No. 75.) Decided March 28, 1914.

Case by Joseph Mero against the Michigan Central Railroad Company for personal injuries. Judgment

* Continued from Vol. 179.

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for plaintiff. Defendant brings error. Reversed; new trial denied.

J. W. Dohany (Frank E. Robson and *Henry Russel,* of counsel), for appellant.

Thomas J. Mahon, for appellee.

MCALVAY, C. J. Plaintiff recovered judgment in this case for damages for personal injuries claimed to have been caused on account of the negligence of defendant. By a writ of error defendant has brought the case to this court for review. The statement of facts contained in the brief of appellant is not questioned except by suggesting an omission to which we will refer later.

The injury complained of occurred upon one of the transfer boats of defendant company, all of which had gone out of commission by reason of opening its tunnel under the Detroit river and were laid up. Plaintiff had been employed by defendant principally as a fireman upon its transfer boats at Detroit for 30 years, and at the time of the accident was engaged with others for some days previous in cleaning out the boilers and painting the fire boxes of these boats. These boats had been used by defendant in transferring cars across the Detroit river. He had previously worked on this steamer one night as fireman. On the day previous to his accident plaintiff went on board this steamer "Detroit" to prosecute such work, and so continued during the entire day. In going to and from such work on that day he used one of the four similar stairways with which this boat is provided to reach the lower deck where the boilers were located. On the following day, October 20th, he came to this steamer at 6 o'clock, after full daylight, on a bright morning and before any others of the men had arrived. The work began at 6:30 in the morning. He went aboard, opened the door to one of the stairways,

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and proceeded to descend from the upper, or main, deck to the place of his employment on the lower deck, which is reached by stairs first to the midship deck and from there down to the lower deck. While so proceeding down this stairway he fell and was injured.

The only question of negligence charged and relied upon by plaintiff which the trial court left with the jury was the claimed negligence of the defendant company in not furnishing lights at that time upon the stairway. There was no evidence in the case that the vessel was not properly equipped with proper appliances, or that this stairway, or deck, or any of the equipment was faulty or defective in any degree. The omission above referred to from the statement of facts, claimed by the appellee, relates to the second count in plaintiff's declaration, where he relied upon sections 1 and 2 of Act No. 104, Pub. Acts 1909 (2 How. Stat. [2d Ed.] §§ 4110, 4111), relative to the liability of common carrier railroad companies for injuries to employees caused by the carrier's negligence, and the rule of comparative negligence established by such act. The trial court held that this vessel had gone out of commission, and therefore the rule of comparative negligence had no application to this case, and so charged the jury, which made it unnecessary for the defendant to refer to it in its statement of facts.

When this injury occurred, plaintiff was the only person on board the steamer. He was, therefore, the only witness who testified to the circumstances under which the injury to him occurred. He testified that after he had proceeded part way down this stairway from the main deck, the door he had opened closed behind him and left him in the dark, that he proceeded down the stairs in safety until he came to the midship deck and was carefully feeling his way to

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find the stairs leading to the lower deck, and, coming upon the opening unexpectedly, fell down the whole length of this stairway to the lower deck before he had taken a single step down the stairs. On cross-examination, after a recess, he gave another version of the circumstances surrounding this accident, and testified that he had located the stairway leading down from the midship deck and had gone down three steps in safety when he fell the entire distance to the lower deck, which his testimony shows he knew was nine or ten feet below the midship deck. He explains his fall by saying that he thought he had reached the bottom of the stairs, because there were three steps down on the stairs of the steamer "Transfer" where he had worked. He had in fact fallen about eight steps.

At the close of plaintiff's case a motion was made on the part of defendant to direct a verdict in its behalf, that no negligence of defendant had been shown, and that the negligence, if any, was on the part of plaintiff. The motion was denied, and an exception taken.

The errors assigned and relied upon by defendant relate to the refusal to grant the foregoing motion, to refusing certain requests to charge, and to certain portions of the charge of the court as given. Such of the assignments of error will be considered as are important and determinative of the questions raised by appellant.

It is contended that the court was in error in submitting to the jury the two versions testified to by plaintiff as to how the accident happened. That two such versions were given by plaintiff and that they are irreconcilable is beyond dispute. The court, in charging the jury relative to the testimony of plaintiff, which was all the testimony as to the occurrence, had stated how he had gone down the stairs to the midship deck, and then proceeded to give his two versions of what occurred afterwards, as follows:

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"What occurred after that you will have to determine, because it is left in considerable doubt by reason of the contradictory statements made by the plaintiff, and the whole case as to what occurred after he got on the half deck is left in considerable doubt, and from the very nature of things, that he was the first man there and that there were no other men there, there is no other witness to the accident except himself, and his case must stand or fall upon what you believe to be the truth from the statement he has made."

The court then related plaintiff's first statement, that in seeking for the stairs in the darkness he fell through the opening of the stairway into the hold of the vessel, and proceeded as follows:

"That is one story that he has told, and he has told another story. He has told the story that he had reached this place, that he started to go down the second stairway from the half deck to the lower deck and that after he had descended some two or three steps he slipped and stumbled and went down and then sustained the injuries of which he complained in this case. I charge and instruct you as a matter of law that if he had started to descend from this half deck to the lower and slipped in some way, either through his own carelessness or the slipperiness of the deck, he cannot recover. So the question of recovery will depend entirely upon what you believe from the story he has told which I think I am justified in saying is somewhat of a contradictory story. What you believe after seeking all, and hunting through all, his testimony to see what the truth is will depend upon what the circumstances were just prior to the time he started to fall and upon the determination of the question whether he did fall before (after) he started to descend, or prior to it."

Appellant contends that each of these contradictory stories of the plaintiff which were submitted to the jury by the court left the jury to guess and speculate that the accident happened in one of two ways as testified to by plaintiff, and insists that under the evidence in the case upon this question the trial court

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should have directed a verdict for defendant. It has been repeatedly held by this court that a jury should not be left "to attribute to a particular cause an injury which may as well be attributable to another." *Fuller* v. *Railroad Co.*, 141 Mich. 66 (104 N. W. 414), and cases cited. In the instant case there was no evidence how this accident occurred except the two theories testified to by plaintiff, and the jury was left to speculate and guess that one was correct and the other incorrect. In our opinion the case is within the decisions of this court which deny the right of the jury to arrive at a verdict in this way. The court was in error in submitting the case to the jury and should have directed a verdict in favor of defendant as requested.

It is further contended that in any event, under the evidence, plaintiff could not recover, on the ground that he had assumed the risk. The record shows that this steamer was not at the time of this accident to plaintiff engaged in commerce, but that it had gone out of commission, and plaintiff and the other workmen were at this time engaged in cleaning and laying up its boilers and machinery. Plaintiff knew this, and also knew that when he went on board the morning of his injury there were no fires under the boilers and that the electric lighting system with which the steamer was equipped was not in operation. From his testimony it appears that when he had proceeded from the main deck to descend to the place of his work, after the door to the stairway which he had opened had closed, while he was on the stairs, he realized that he was not able to see by reason of the want of light. His testimony is that there was no light below, and that he could see no light at all, and that he proceeded and the injury occurred as has already been stated. He had gone down one of these stairways the morning before. His testimony shows

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that he had spent many years in the employment of defendant upon some of these transfer boats, and that during practically his whole mature life he had been employed upon steam vessels as a fireman. His testimony shows that he knew there were no other men upon the boat at the time, and that he expected to go down to the lower deck and wait until they arrived. As far as the record shows he was a man of ordinary intelligence. When, after plaintiff had gone down this stairway but a few steps toward the midship deck, and the door closed behind him, and he realized that he was in the dark, he chose to proceed down this stairway to the lower deck with knowledge that there was no light anywhere below, it must be held that he assumed the risk of any injury resulting from the absence of light. The learned trial judge at the close of taking testimony in the case, in finally denying the motion to instruct a verdict for the defendant, and also later in his charge to the jury, recognized that this doctrine of assumed risk here invoked was applicable, if he had started to go down the stairway from the midship deck to the lower deck and fell after he had gone down two or three steps.

The court was in error in not so holding and instructing a verdict on that ground in favor of defendant, as requested.

The judgment of the circuit court is reversed, and, as no different testimony could be produced at another trial, no new trial is granted.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

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MONEYWEIGHT SCALE CO. *v.* DAVID.

1. APPEAL AND ERROR—SAVING QUESTIONS FOR REVIEW.
This court will not pass on questions which were not presented to the trial court.

2. RECOUPMENT—SALES—BREACH OF WARRANTY.
Recoupment will not lie for breach of warranty of an executory contract of sale, under which title was not to pass on delivery but at the completion of the stipulated payments, and until the price has been paid no right of action on the warranty is available.

3. INTEREST—APPEAL AND ERROR.
On error to review a judgment for the price of certain scales which included an excessive amount of interest, the judgment may be entered for the correct amount, which plaintiff's attorney consented to accept, remitting the excess.

Error to Kent; Perkins, J. Submitted April 28, 1913. (Docket No: 113.) Decided March 28, 1914.

Assumpsit in justice's court by the Moneyweight Scale Company against Joseph David and Deeb Hattem on a promissory note. From a judgment for defendants, plaintiff appealed to the circuit court. Judgment for plaintiff on a directed verdict. Defendants bring error. Reduced and affirmed.

E. J. Doyle, for appellants.

Hall & Gillard, for appellee.

MCALVAY, C. J. Plaintiff recovered judgment against defendants upon a directed verdict in a suit brought on a promissory note executed by them for the amount due upon such note. Plaintiff is engaged in selling certain computing scales to the trade upon written orders, by the terms of which the title to the

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property remains in plaintiff until the purchase price is paid; the payment of the price, except the initial sum of $10, being deferred according to the terms of the promissory note printed upon the same blank which contains the contract order for the scales. The contract order is of considerable length. It was given November 8, 1910, by defendants for two computing scales of the capacity of two pounds each, to be shipped to them at Grand Rapids, Mich., for which they agreed to pay the sum of $70, $10 cash with the order, and the balance, $60, payable as evidenced by the note attached to the order, $5 each month, beginning March 1, 1911, and continuing to February 1, 1912. The order provided, among other things, that, should there be any failure to promptly pay such note or any payment thereon when due, or if plaintiff should feel itself insecure, or if defendants should be sued and their property levied upon, then the whole unpaid balance of the purchase price should, at the option of plaintiff, without notice, become due and payable, and possession might be taken of the scales without legal process, unless an extension in writing was given, and previous payments should be considered as having been made for the use of the scales, during the time they remained in the custody of defendants. It was further agreed that title to the scales should not pass from plaintiff until paid for in full, and until such time the scales would remain the property of plaintiff; also that bringing any suit for the price of the scales would not operate to vest the title thereto in defendants, but such title should remain in plaintiff until any judgment recovered for such purchase price should be paid, and, in case of recovery, all costs and attorney fees should be paid by defendants. It was further agreed that the scales were to be held by defendants at their own risk pending the vesting of title in them, and no injury, loss, or destruction of said

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scales, by any cause whatever, except plaintiff's fault, should release defendants from their obligation to pay the purchase price therefor, and the contract was to remain in full force and effect as to any other scale that might be sent in exchange for those originally delivered. It was agreed that the contract and order should not be countermanded, and covered all the agreements between the parties. Defendants certified that they had read the contract and acknowledged receipt of a duplicate. This contract was duly executed by defendants. The following is a note given at the time:

"$60.00. State, Mich. Town, Grand Rapids. Date, Nov. 8, 1910.

"For value received I (or we) promise to pay to the order of Moneyweight Scale Co., 47 State St., Chicago, Illinois, sixty dollars ($60.00) dollars, payable as follows:

Jan. 1, 1912,	$5.00	July 1, 1911,	$5.00
Feb. 1, 1912,	$5.00	Aug. 1, 1911,	$5.00
Mch. 1, 1911,	$5.00	Sept. 1, 1911,	$5.00
April 1, 1911,	$5.00	Oct. 1, 1911,	$5.00
May 1, 1911,	$5.00	Nov. 1, 1911,	$5.00
June 1, 1911,	$5.00	Dec. 1, 1911,	$5.00

"New York or Chicago Exchange.

[Sign here] "DAVID & HATTEM."

There was printed under the signature a statement that "the above note draws interest at six per cent. per annum from date of shipment or delivery if delivered by salesman," also if payments were promptly made interest would be waived, otherwise full interest would be charged, and, if the account was paid in 30 days, 5 per cent. discount would be allowed.

After the execution of the order and note, the scales were delivered to defendants at their place of business. A guaranty in writing, dated on the same date, was delivered to defendants by plaintiff's agent, whereby it was guaranteed that these scales, Nos. 287,521 and 287,606—

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"Will weigh correctly any article capable of being weighed on it and should the scales get out of order at any time within two years from date of shipment with ordinary use (not dropped or broken) will repair the same gratis, the purchaser paying the freight or express charges to and from the factory.

"We further guarantee that all pound and ounce graduations within the capacity of this scale which carry corresponding computations are commercially correct, and we hereby guarantee to indemnify and protect the purchaser of this scale against loss resulting from possible suits by competing manufacturers charging infringement of patents."

This case was begun in justice's court May 23, 1911.

"Plaintiff declares orally on all the common counts in assumpsit specially on written contract, to plaintiff's damage, $500. The defendants pleaded orally general issue and recoupment."

From the time the writings were made and entered into, as stated, and the scales in question were delivered to defendants by plaintiff's agent, defendants, who were engaged in business as partners, conducting a confectionery store in the city of Grand Rapids, used these scales in their business continuously up to January 1, 1911, when defendant David sold his interest in that business to his partner Hattem and a Mr. Malobey, who, as partners, continued the business and used the scales in question continuously up to February 20, 1911, when, upon inspection by the city sealer of weights, one of these scales was not passed by him, and the firm was ordered not to use it.

Concerning the foregoing facts in this case as stated, there is no dispute in the record. There was a disputed fact in the case between these parties concerning which the court in his charge to the jury said:

"It is claimed on the part of plaintiff that when they were notified that the scales were out of order they immediately sought to repair them, and that the de-

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fendants refused to permit a repair and insisted that the plaintiff take that pair of scales back.

"On the other hand, the defendants claim that they notified the plaintiff, and the plaintiff neglected to repair them and continued to neglect to repair them after the suit was brought. That is a question of fact which, if the case should be submitted to the jury, would be for the jury to determine, and it is practically the only question of fact in the case."

Defendants have removed the case to this court upon writ of error for review. Defendants rely upon but two of the errors assigned, namely, that the court erred in taking the case from the jury and directing a verdict for plaintiff, and also that the court erred as to the amount of the verdict directed.

Defendants in their brief urge that there was a substituted contract or novation. This is based upon the claim made for the first time in this court by them that the guaranty was not given to defendants by plaintiff but was given to their successors, Hattem & Malobey, as appears from the copy of such guaranty printed in the record. An examination of the entire record shows that neither by notice under the plea of the general issue, nor by any testimony, nor by any claim made by or on the part of defendants does it appear that the question of novation was mentioned or in any manner brought to the attention of the trial court, and the claim is made for the first time in their brief filed in the case that the guaranty was given to Hattem & Malobey. The rule that questions not raised and passed upon in the trial court will not be considered for the first time in this court is too well settled to require discussion.

The defense interposed in this case is based upon the notice of recoupment. The amount of damages claimed which defendants consider they are entitled to does not appear in the evidence. The court, in directing a verdict, held that this was an entire contract, and, "if the contract is to be repudiated, it must be

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repudiated as an entirety and not as a part of it only," and also held that:

"There is no right under the law given to defendants to recoup damages in a case like this. The law is that, until the title passes, there can be no recovery for a breach of guaranty, and the title has not passed to the defendants in this case and cannot pass until they have paid for the scales. And any claim for damages by way of recoupment under these circumstances under the law cannot be allowed."

By the recoupment sought to be recovered, defendants are undertaking to recover for a breach of the warranty given by plaintiff. In this case it appears that this was an executory contract; that title did not pass and, under the agreement, would not pass until full payment of the agreed price. The court, therefore, was not in error in so holding. *Bunday* v. *Machine Co.*, 143 Mich. 10, at page 13 (106 N. W. 397, 5 L. R. A. [N. S.] 475), and cases cited. It follows that the court properly instructed a verdict for plaintiff.

Defendants' next contention is that the amount of the judgment directed was erroneous; that no credit was given for the months of January and February, 1911, which they claim has been paid. This is clearly a mistake, for the reason that the written order and note which was used at the time of the argument and left with the court for examination shows that the first payment became due March 1, 1911, and thereafter on the 1st day of each month following a payment of $5 became due for 12 months, until the amount of $60 would be paid. This would require the payment of $5 to be paid on January 1, 1912, and also a like amount on February 1, 1912. The printed blank upon which this order and note were written contains 12 spaces, in 3 columns of 4 each, in which to write payments for each of the 12 calendar months. Beginning with the 1st of March, 1911, when the note

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shows the first payment was due, down to the 1st of December, 1911, were spaces for but 10 payments, making $50 of the balance due, and no spaces were left for the two remaining payments except on the blank above the first payment. These two last payments are distinctly written in the blank as follows: "Jan. 1, 1912, $5.00. Feb. 1, 1912, $5.00"—so that in position on the note the last two payments are written first and might readily be taken to be the first two to become due, unless care was taken in reading the year in which a payment was to occur.

Neither of the defendants testified that more than $10 ever had been paid upon this contract, nor is there any such evidence in the case.

The sole remaining question is whether interest on the balance due was correctly computed. Each payment on this note would draw interest at 5 per cent. from the date it became due until November 13, 1912, the date of the entry of the judgment. A computation shows that the entire sum of interest amounts to $3.67, which, added to the principal, $60, gives $63.67. This makes an excess of interest amounting to $3.53. During the trial, or when the court directed a verdict for the amount as computed by plaintiff's attorney, no objection whatever was made on the part of defendants that such computation was incorrect.

Other portions of the charge are criticised in appellants' brief, but, as no exceptions were taken or errors assigned upon them, this court will not consider them.

We find no reversible error in the case, and, as counsel for plaintiff in his brief is willing to remit any excess of interest which may have been included in the amount of the verdict, judgment of the circuit court will stand affirmed for the sum of $63.67, with costs in favor of plaintiff.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

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ALCONA COUNTY AGRICULTURAL SOCIETY *v.* COLWELL.

BOUNDARIES—ADVERSE POSSESSION—FENCES.

In an injunction suit involving the boundary lines of complainant's real property, evidence examined, and *held*, to support a decree for complainant and against defendants' claim of adverse possession.

Appeal from Alcona; Connine, J. Submitted April 10, 1913. (Docket No. 24.) Decided March 28, 1914.

Bill for injunction by the Alcona County Agricultural Society against George W. Colwell and others. From a decree for complainant, defendants appeal. Affirmed.

John H. Kilmaster, for complainant.

O. H. Smith, for defendants.

MCALVAY, C. J. Complainant, a Michigan corporation, filed its bill against defendants, who occupy certain premises in the village of Harrisville, Alcona county, adjoining the property of complainant on the west, charging that defendants have wrongfully torn down the line fence erected by it between the lands of the parties, and after it had rebuilt said fence entirely upon its own land defendants threatened to tear it down again and destroy it. It prayed for an injunction to restrain them from so doing, and a decree for all damages occasioned by reason of defendants' unlawful conduct in destroying said fence, and for general relief. Defendants' joint answer to this bill of complaint admits the allegations of complainant's bill that it was duly incorporated and had the record title of the premises claimed, but claimed there was a mistake in the description of land in its deed, and it had never had possession of the portion in dispute in

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this case. Defendants admit that they destroyed the fence in question and threatened after it had been rebuilt by complainant to tear it down again because it was built without authority upon their premises. They further alleged that they have been in the adverse possession of the strip in dispute for 26 years, and claimed by their answer the benefit of a cross-bill, asking that the title to this piece of land be decreed in defendant Mary G. Colwell. The case was heard upon proofs taken in open court, and resulted in a decree in favor of complainant.

The parties to this suit own and occupy adjacent portions of land situated on lot 2, section 12, in town 26 north, of range 9 east, in the county of Alcona. The record shows that complainant, on March 15, 1883, purchased by warranty deed this description of land from defendants George W. Colwell and wife and others, members of Colwell Bros. & Co., a copartnership, and has owned and occupied it continuously since that time. The description of these premises is as follows:

"Commencing 847 feet east of the southwest corner of lot 1 in section 12 town 26 north, of range 9 east; thence, south 9 degrees and 30 minutes west to Washington street, in the village of Harrisville, as surveyed and platted by H. G. Rothwell, C. E.; thence, south 80 degrees 30 minutes east 538 feet along the line of said street; thence, north 9 degrees and 30 minutes east to the line between lots 1 and 2 in section 12 in said township; thence west on said line 550 feet to the place of beginning, being a part of lot 2 of section 12 above mentioned."

The description under which defendants occupy the premises adjoining complainant on the west, which were later, by several deeds from defendant George W. Colwell and others, conveyed to defendant Mary G. Colwell, situated on lot 2, of said section 12, as given in the deed to her, dated October 4, 1901, reads as follows:

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"All that part of lot 2 in section 12 in township twenty-six (26) north, range nine (9) east: Commencing at the southwest corner of land owned by the Alcona Agricultural Society; thence, north along the west line of the Alcona County Society's lands to the north line of said lot two (2); thence, west to the east line of the Detroit & Mackinac Co.'s right of way; thence, southerly along the east line of the Detroit & Mackinac Co.'s right of way to Washington street; thence, easterly along the north side of Washington street to place of beginning."

A voluminous record is returned containing a large amount of testimony of many witnesses, a reading of which satisfies us, as it did the learned trial judge, that much of it is contradictory and irreconcilable. Defendants do not ask to have the claimed error in the description of land conveyed to complainant by its deed corrected, but rely upon adverse possession, and dispute the correctness of complainant's surveys.

From the descriptions in the deeds as already given, conveying title to the parties to this suit, it will be noticed that the title conveyed to complainant by the members of Colwell Bros. & Co. antedates by more than 18 years the deed to defendant Mary G. Colwell, and both descriptions are by metes and bounds. By these deeds to these parties the west line of complainant's land coincides with the east line of land claimed by defendants, and the description in Mrs. Colwell's deed cannot be determined without first ascertaining and locating the west line of complainant's premises, as is apparent from the description, which reads:

"Commencing at the southwest corner of land owned by the Alcona Agricultural Society; thence, north along the west line of the Alcona County Society's lands to the north line of said lot 2; thence, west," etc.

It will be of no benefit for this court to analyze and

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digest the testimony of the parties and many witnesses produced by them in this case. This has been done with care by the learned trial judge before whom the witnesses were produced and in whose presence they testified. He has carefully stated in an opinion which is in the record the contentions of these parties and his conclusions from the testimony given.

The contention of defendants throughout the case is that the complainant never took possession of this strip of land, but built its first fence 45 feet east of the point where it now contends defendants' northwest corner is located, and until the year 1909 maintained such fence running south from that point to the southwest corner of its land. Complainant insists that the first fence it built on the west side inclosing the premises deeded to it was constructed upon practically the same line where its present fence is located, and included the piece of land in controversy, which is wedge-shaped, being 45 feet wide at the north end and running to a point something more than halfway to the southwest corner. Defendant Colwell was a member of the firm of Colwell Bros. & Co., and, with his wife as a party thereto, executed and delivered the warranty deed given to it by the grantors.

In our opinion the controversy turns upon the question of fact as to whether the survey recently made by complainant can be accepted as correct, and whether the original fence constructed by it along the west line of the premises described in the warranty deed from the members of the firm of Colwell Bros. & Co. and their wives to it was upon the line coincident with the line of such survey. From our examination of the testimony in this record we are satisfied that the conclusion of the trial court favorable to the complainant upon both these propositions is supported by the weight of the evidence, and that complainant's survey coincides with the line upon

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which the first fence was built, and the fence as now constructed by it along the west line of its premises is located entirely upon its own land.

The decree of the circuit court is affirmed, with costs of both courts in favor of complainant and against defendants.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

HOGUE *v.* WELLS.

1. ELECTION OF REMEDIES—ASSUMPSIT—WAIVER OF TORT.
   Not knowing at the time of commencing an action that defendant had converted money collected for plaintiff to his own use, the plaintiff did not waive her right to amend her declaration from assumpsit to trover, since full knowledge is essential to a claimed waiver.

2. TROVER AND CONVERSION—CHECKS—EVIDENCE—AGENCY.
   Where testimony was introduced tending to prove that plaintiff's agent received a check in payment for a note in his hands, and that the check had been marked paid by the bank on which it was drawn, and where the trial court refused to permit the agent to testify that he received no money or its equivalent for the check, at the trial of an action of trover, and it appeared that the relation between plaintiff and defendant was of a fiduciary character and not that of debtor and creditor, and defendant had the note in his hands for collection, trover was correctly held to be a proper remedy for the unlawful retention of the fund, and the trial court properly excluded the testimony offered to show that the payment by check was not in fact what the transaction, on its face, purported to be.

   STONE, OSTRANDER, BIRD, and MOORE, JJ., dissenting.

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Error to Berrien; Bridgman, J. Submitted April 24, 1913. (Docket No. 48.) Decided March 28, 1914.

Trover by Mary R. Hogue against Benjamin F. Wells for the conversion of funds belonging to plaintiff. Judgment for plaintiff on a directed verdict. Defendant brings error. Affirmed by an equally divided court.

John J. Sterling, for appellant.

Cady & Andrews, for appellee.

MCALVAY, C. J. In an action in trover brought by plaintiff against defendant for the unlawful conversion of certain money belonging to her, she recovered a judgment upon an instructed verdict. Defendant has removed the case to this court for review and asks a reversal, assigning errors upon the rulings of the court during the trial and in instructing a verdict against him.

The following are the facts in the case: Defendant was at the time of the transaction in dispute, and had been for a period of years prior thereto, assistant cashier of the Benton Harbor State Bank. On September 16, 1909, he sold and assigned to plaintiff for a valuable consideration the following promissory note, together with a certain certificate of stock held by him as collateral security therefor:

"$2,400. BENTON HARBOR, MICH., Sept. 1, 1908.

"On the first day of each month after date for value received, I promise to pay to the order of B. F. Wells, forty dollars ($40.00) until the whole principal sum of two thousand four hundred dollars with interest on the same at the rate of six per cent. per annum payable annually shall have been paid on all principal sums at any time unpaid, and if the interest is not paid when due it shall become as principal and draw interest at the rate of six per cent. per annum, payable annually. It is also agreed that A. S. Miles shall

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deposit with and assign to B. F. Wells all his stock in the Miles Shoe Company as collateral security for the repayment of the said two thousand four hundred dollars and the interest thereon.

[Signed] "A. S. MILES."

At the same time he indorsed on the back of said note and signed the following written guaranty:

"BENTON HARBOR, MICH., Sept. 16, 1909.

"For a valuable consideration, I do hereby sell, assign and transfer to Mary R. Hogue, all my right, title and interest in and to the within instrument, and further for a valuable consideration, I do hereby guarantee the payment of the sums of money in the within instrument at the times and in the manner therein specified, I also assign to said Mary R. Hogue the certificate of stock referred to in said note and the same is hereby attached.

[Signed] "B. F. WELLS."

At the time of such transfer there was a balance of $2,200 remaining unpaid on said note. Plaintiff at this time had a credit account in and did business with said bank. She left this note in the possession of defendant with instructions to collect for her and, as from time to time the installments of principal and interest became due, to receive and place the same to her credit in the bank. Defendant received the note from her for that purpose and made collections for her from the maker of said note each and every month thereafter during the years 1909 and 1910 and certain payments amounting to five monthly payments in 1911, and indorsed all of said payments received by him upon said note and placed the amounts so collected for her to her credit in the bank. On June 17, 1911, the maker of plaintiff's note, who was secretary and treasurer of the Miles Shoe Company, of which defendant had been president for several years, drew the check of said company on the Benton Harbor State Bank, of which defendant was assistant cashier, for the sum of $3,724, payable to the order of defendant;

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such sum being made up of the amount of a certain $2,000 indebtedness of A. S. Miles to defendant and $1,724.46, the amount of the balance of plaintiff's note. Miles delivered this check to defendant, who indorsed it, presented it to the bank, which honored it and stamped it paid, and returned it in due course of business to the maker. The following is a copy of this check, and the indorsement and bank stamp upon it:

"No. 3528.

"BENTON HARBOR, MICH., June 17, 1911.

"Benton Harbor State Bank pay to the order of B. F. Wells three thousand seven hundred and twenty-four and 46-100ths ($3,724.46). A. S. Miles notes.

"THE MILES SHOE CO.,

"per A. S. MILES."

Indorsed on the back: "B. F. Wells." Stamped on the face of it: "Paid June 17, 1911, Benton Harbor State Bank, Benton Harbor, Michigan."

Defendant admits that this check represented the amount of the two items named. This check represented Miles' personal indebtedness to defendant, and was charged to his personal account at the time in the books of the Miles Shoe Company.

Of this check of $3,724.46, which was received and indorsed by Wells, and paid to him by the bank, he retained the whole amount and did not account for and deliver to her by depositing to the credit of plaintiff the amount of her specific interest therein. At the time of this transaction, when defendant received this check from Miles in payment of the indebtedness to him and the balance of plaintiff's note, she was in the West visiting. Upon her return, and before the fact that the entire balance on her note had been paid to her agent and collector by the maker came to her knowledge, she began a suit in assumpsit on this note, commenced by summons, and afterwards filed declaration. In this suit there was afterwards a substitution of attorneys, and, when her present

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attorneys learned through Mr. Miles of the payment of the note in question, a motion was made by them for leave to withdraw the declaration filed and for permission to file a declaration in trover. This motion was granted and a declaration in trover filed, on payment of costs. Defendant pleaded the general issue to this declaration, with notice that plaintiff had elected to bring suit in assumpsit instead of trover and had therefore waived her right of action against defendant in trover. The trial now under discussion and consideration before this court was the trial had upon this issue. At the close of plaintiff's case defendant moved for a directed verdict upon the ground stated in the motion attached to the plea.

The contentions of defendant upon the trial of the case were:

(1) That plaintiff had waived her right of action in trover by bringing an action in assumpsit.

(2) That an action of trover for the conversion of this money will not lie against defendant in this case, even if it should be held that he had received it.

1. The information that the balance unpaid on plaintiff's note had been fully paid to defendant did not come to the knowledge of plaintiff until after the declaration in assumpsit had been filed in this suit and the substitution of attorneys had been made. The contention that plaintiff had waived a right of action in trover, therefore, cannot be sustained, for the reason that at the time plaintiff had no knowledge that such right of action existed. It is well settled that a party cannot waive a right of which he has no knowledge.

"There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts which would enable him to take effectual action for the enforcement of such rights." *Clare County Sav. Bank* v. *Featherly*, 173 Mich. 292 (139 N. W. 61), citing 29 Am. & Eng. Enc. Law (2d Ed.), p. 1093.

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2. Under this contention defendant urges that this money, for the wrongful conversion of which this suit is instituted, if in his hands, was a general indebtedness on his part to the plaintiff, and that this suit is brought in trover to recover money generally and not a specific fund of money delivered to him to be returned to her in specie. There is no dispute in this case but that the relation between plaintiff and defendant was that of principal and agent. He was a collector for her of the amount of this note and was recognized and had acted as such for nearly two years, about which there is no dispute. A specific portion of the proceeds of the check which Miles gave defendant and which the bank paid him was the property of plaintiff received by defendant to be delivered in a prescribed manner to her. And this is not disputed by defendant, and in fact his contention on this proposition now under consideration admits it. This fund never came to his hands as his money. He never had any right to its possession except for a certain purpose. His relations in this matter to plaintiff were fiduciary. His retention of this fund was therefore an unlawful conversion, and like conduct is defined and punished in this State as statutory larceny. To hold that such wrongful conversion cannot be made the basis of an action in trover would seem to be a stultification of judicial conscience. Under the circumstances of this case, trover was a proper remedy. The trial court therefore was not in error in denying the motion of defendant to instruct a verdict against plaintiff.

Upon the trial defendant made an offer to prove that no payment was ever made by Miles to him of the balance of plaintiff's note; that he, being a creditor of the Miles Shoe Company to the amount of $2,000, on his individual claim and the bank a creditor of about $2,700, and he having guaranteed the payment of plaintiff's note when he sold it to her and transferred the collateral, knowing of the uncertain finan-

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cial condition of the Miles Shoe Company, undertook to get security for the entire amount, $6,300, on these claims; that in furtherance of such undertaking one W. G. Newland took notes of the Miles Shoe Company for $6,300 secured by chattel mortgage upon its entire stock and property, and Newland drew and delivered his check on the Benton Harbor State Bank for that amount to said company; that this check was indorsed by the Miles Shoe Company, presented to the bank, and stamped paid by said bank June 17, 1911; that the check of $3,724.46, which has already been referred to, was drawn against this credit; that in truth and fact no money was ever paid on this transaction, but that it was done in order to accomplish defendant's plan to get bona fide security for these items of indebtedness above stated.

The court refused to pass upon this offer made by defendant as a whole, for reasons given by him, which will appear in excerpts which we will quote from the record. This offer of proof was made at the close of the cross-examination of Mr. Miles, plaintiff's last witness, when Mr. Sterling, counsel for defendant, said:

"*Mr. Sterling:* Before you rest I want to make an offer of proof, and I have a motion to make also. (The jury retired from the courtroom.)

"*Mr. Sterling:* Since last night I wrote out more in detail what I wanted to put in the record, of what I wanted to show, and I will read it and have it in the record."

This statement was then read into the record. As given in this opinion it is very much condensed. When the reading was finished, the following colloquy between court and counsel occurred:

"*The Court:* What do you say?

"*Mr. Andrews:* I haven't anything to say. Questions have been asked about everything that has been presented. About half the testimony has been admitted and the other—

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"*The Court:* Do you object to it?

"*Mr. Andrews:* There is nothing before the court.

"*Mr. Sterling:* I will make this offer.

"*The Court:* Plaintiff has rested his case.

"*Mr. Sterling:* But not until I get the offer in.

"*The Court:* It is impossible to rule on that offer, Mr. Sterling, in consideration of the condition of the proofs. One part of your offer has been given and received in evidence, so it would be impossible to rule on that offer in general. Some parts have been introduced and some parts the court has sustained the objection to.

"*Mr. Sterling:* I offer to show all that proof by Mr. Miles, the last witness on the stand for plaintiff.

"*The Court:* I shall decline to rule on the offer as a whole at this time, irrespective of any technicalities, as it would be impossible, it seems to me, under the condition of the evidence as it now appears. Part of that that you put in there has been admitted.

"*Mr. Sterling:* Just enough admitted to leave the jury in doubt as to certain points I want to clear up.

"*The Court:* Under the theory of the court, a large part that you have offered is inadmissible entirely. I shall decline to rule upon the offer as a whole, but if counsel desires to recall Mr. Miles he may recall him and ask such questions as he desires if you have omitted any question.

"*Mr. Sterling:* I want to show I offer this testimony, and what the court has said appears on the record, and I take exception to the ruling of the court, and to the attitude of the court to rule either favorably or unfavorably on the testimony."

Counsel for defendant then made a motion that the court direct a verdict in his favor. This motion included the propositions relative to the declaration in trover, and also that trover was not the proper remedy, which have already been discussed. It was denied, and one of the errors assigned is upon such denial. In this opinion we have already considered and disposed of these questions against the contention of defendant.

A verdict was directed by the court in favor of plaintiff, and upon this direction error is assigned. It is

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apparent that, if the court was in error in excluding the above offer of proofs made by defendant, such verdict should not have been directed.

Defendant insisted that the court should consider the offer made as a whole, and the exception taken to the refusal of the court "to rule either favorably or unfavorably on the testimony offered" is that relied on. It will be noted that the court did not deny counsel the right to offer testimony in the ordinary way; in fact, the court, in declining to rule upon the offer as a whole, suggested to counsel to recall the witness and further examine him. Counsel was in error in insisting as he did upon a ruling upon the offer as made. He should have followed the suggestion of the court.

This leaves to be determined the question whether the record discloses any evidence in the case on the part of defendant to be submitted to the jury. An examination of the entire record satisfies us that there was no such evidence, and that the court was not in error in instructing a verdict for plaintiff.

The judgment of the circuit court is affirmed.

BROOKE, KUHN. and STEERE, JJ., concurred with MCALVAY, C. J.

OSTRANDER, J. *(dissenting)*. Plaintiff's right to recover in this action is based, initially, upon the fact that she owned a note for $2,400, dated September 1, 1908, payable $40 each month, with interest at 6 per cent. per annum, payable annually, made by one A. S. Miles to defendant and sold and assigned to plaintiff by defendant September 16, 1909, payment of which note, according to its terms, defendant guaranteed. Payment of the note was secured by a collateral assignment of stock of the Miles Shoe Company. Payments were made on this note to and including the one due in May, 1911, and when this action

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was begun in January, 1912, only a portion of the note was due and only a portion of it could have been recovered, of the maker or the guarantor, in an action on the note.

Plaintiff's right to recover rests immediately upon the alleged fact that defendant, who had the note for collection of the monthly payments, received payment of the entire balance due thereon June 17, 1911, by way of a check dated that day, made by the Miles Shoe Company, payable to the order of defendant. It will be noted that the Miles Shoe Company was not the maker of the note and not obligated to pay it; nor could plaintiff have been obliged, at that time, to accept payment of the note. The check was produced and is set out in the opinion of Mr. Justice MCALVAY. As he points out, the check was drawn on the Benton Harbor State Bank, and it bore on its face the bank stamp, "Paid June 17, 1911." In addition, plaintiff introduced the testimony of Mr. Miles, who testified that he paid the note in question to defendant by way of this check. There is the admission of the defendant that the check—one of two or more checks given —was for the amount of the note and for other indebtedness owed to defendant. This is, in substance, the evidence tending to prove that defendant had ever received money or money's worth on plaintiff's account. In saying this, I have not overlooked the testimony of defendant, upon his cross-examination, to be hereinafter referred to. Such evidence as the check afforded of payment to and receipt by defendant of money belonging to plaintiff was by the court held to be indisputable.

Defendant offered to prove that the check did not represent money and that not a penny of cash ever was disturbed by it, and, further, that none of the parties to a transaction of which the giving of the check was a part ever intended that any money should

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pass by the check. He offered to prove that the Miles Shoe Company and A. S. Miles were indebted to defendant in the sum of $6,300, evidenced by notes of which the one belonging to plaintiff was one; that the shoe company was involved, financially; that, to obtain security, a third person, one W. G. Newland, was introduced into the affair; that to Newland Miles gave three notes of $2,100 each, dated June 10, 1911, and to secure their payment executed a chattel mortgage on the stock of goods of the shoe company; that in return for these notes Miles received from Newland the check of defendant, drawn on the Benton Harbor State Bank, for $6,300; that Newland indorsed the notes and assigned the chattel mortgage to defendant for the check; that against this apparent credit created by defendant's check, Miles drew checks to the same amount, in payment of old notes, including plaintiff's note, and in this manner new notes, with new security, were substituted for the old; and that not one dollar in cash changed hands; and that no party to the transaction intended that any money should change hands. Repeatedly, rulings such as are indicated in the following excerpt from the record were made by the court (the witness Miles was being cross-examined):

"*Q.* Did you get any money from the bank on this check given by W. G. Newland to you on the 10th of June, 1911?

"*Mr. Andrews:* I object to that as immaterial and irrelevant.

"*The Court:* The objection is sustained.

"*Mr. Sterling:* Note an exception.

"*Q.* Was there a single penny of coin or currency that you obtained on the Newland check, or that Mr. Wells obtained on your check given him on the 17th of June?

"*Mr. Andrews:* I object to the question.

"*Q.* Was there any money, either currency or coin, obtained by anybody on that transaction?

"*Mr. Andrews:* I object to the question as irrelevant and immaterial.

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"*The Court:* The objection will be sustained. I don't think it is well to contradict the paper itself.
"*Mr. Sterling:* Note an exception."

Defendant was a witness and gave testimony. The following is a portion of what took place upon his direct examination:

"Q. Does this check, dated June 17, 1911, which bears your signature, marked 'Exhibit 2,' represent any money that you obtained from the Benton Harbor State Bank to the Miles Shoe Company?
"*Mr. Andrews:* We object to the question as irrelevant, incompetent, and immaterial.
"*The Court:* The objection will be sustained. The paper speaks for itself.
"Q. During the entire transaction between you and Miles, in which this check figures, and was given to you, did you obtain for Mrs. Hogue from Mr. Miles a single penny?
"*Mr. Andrews:* I object to that question as irrelevant, incompetent, and immaterial, and, further, calls for the conclusion of the witness.
"*The Court:* The objection will be sustained, and the question has substantially been answered three times, and has been substantially asked and ruled on three times.
"*Mr. Sterling:* I take exception to the ruling of the court.
"Q. Have you in your possession, or have you ever had in your possession, any money belonging to Mrs. Hogue that you have not turned over to her?
"*Mr. Andrews:* The same objection.
"*The Court:* That objection will be sustained also. That would be his conclusion. What you are endeavoring to get at is his legal conclusion.
"*Mr. Sterling:* I do not think the question is susceptible of that interpretation.
"*The Court:* The court so thinks it is. There is a paper signed by Mr. Wells in which it appears that there was $3,700 passed to him. That represents money because it was paid to him by the bank, and that says it was to pay the Miles notes, and that whole paper is to be taken together. As long as the bank paid him that money, he must have had it. The ques-

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tion whether it was or not to pay the Miles notes—it was to pay some notes, and the court held if it didn't pay those notes you might show what notes it was intended to pay, but that he had that money. A blanket question whether he had the money in his possession that he had not paid to Mrs. Hogue might be misleading to the jury.

"*Mr. Sterling:* The witness testified that he did not get any money on this check.

"*The Court:* No, he has not. The court said he could not contradict that paper very well.

"*Mr. Sterling:* I take an exception to the ruling."

It is said in the brief for appellee:

"The trial court held that the check being drawn to defendant, as payee, and indorsed by him upon its back, and no other indorsement appearing thereon, except the stamp 'Paid' by the bank, and the check being returned to Miles, the maker, in the regular course of business showed conclusively that Miles had paid defendant the amount of money named in the check."

This action is trover for money. It may be conceded that if, when all of the facts are elucidated, it appears that defendant directly or indirectly received from the maker of plaintiff's note, or from anybody, money in payment thereof, he may be held liable in trover for the money so received by him. Defendant held the note for collection and if money, or its equivalent, was paid to him for plaintiff, he was bound to pay it over to her. It must be held, however, that the check he received was not conclusive evidence that he received any money. He had the right to show, and was prevented from showing, that no money came to him, and that no one intended that any should come to him—to show the real transaction. *Alfred Shrimpton & Sons* v. *Culver*, 109 Mich. 577 (67 N. W. 907).

Defendant testified on cross-examination that, having concluded the transaction referred to, he did not pay plaintiff the amount due on her note because he regarded plaintiff indebted to himself in a greater

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sum. This statement he later on amended; but, assuming that the jury had the right to take this statement as true, it does not change the legal aspect of the affair. Plaintiff was not bound to accept for her old note and defendant's guaranty a new note and chattel mortgage security. Defendant had the right to pay her her note and himself own the new secured notes. And if plaintiff insisted upon the demand evidenced by her note, she could insist upon payment only in accordance with its terms, namely, $40 monthly.

It is said in the brief of counsel for appellee:

"In conclusion, we submit the real and only question in this case is whether the trial court should have permitted defendant to have shown that Newland was a mere figurehead in the case, and loaned himself, and his credit, to defendant to secure defendant's claim against Miles, by Newland taking a note and chattel mortgage from Miles, and then assigning this note and mortgage to Wells, on the ground that this circuitous transaction was for the purpose only of securing the indebtedness from Miles to Wells. The real result of this transaction, if it had been successful, would have been to defeat the claims of all the other creditors of Miles, and the Miles Shoe Company, and enforced the payment to defendant of his claim in full.

"Defendant says the purpose of this transaction was only to secure his claim against Miles. Defendant could have taken the chattel mortgage direct from Miles to himself, and secured his claim. Then the real object in involving Newland in the transaction was to gain an undue advantage over the other creditors of Miles by having the deal pass through the bank, and through an apparently innocent third party, thereby leaving behind the footprints of a legitimate transaction, and have the transaction less liable to a successful attack by the injured creditors of Miles. The defendant having failed in this unworthy attempt, by these creditors asserting their rights before the expiration of four months, fixed by the bankruptcy law, will not permit defendant to dispute the payment of the Hogue note by Miles to the defendant with the

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money he (Miles) had received from Newland, and for which he had given Newland his note secured by a chattel mortgage. As held by the trial court, it is immaterial where Miles obtained his money to pay defendant. However, it does appear by defendant himself that he obtained it from Newland. Plaintiff's action cannot be defeated by defendant showing that at the time the money was obtained from Newland, that it was understood that defendant was to pay back to Newland the money he (defendant) had received from Miles, and take an assignment of the Miles note and chattel mortgage from Newland. Defendant will not be permitted to play fast and loose with the courts in this manner, changing front as often as it appears to him to be to his advantage so to do. As this court has many times said, Mr. Wells 'will be left to lie in the bed he has made for himself.'

"The offer of defendant's counsel set forth on pages 46 and 47, of the record, shows that the defendant's position was that he had a right to show that, at the time Miles obtained the money from Newland to pay Wells, it was agreed that Newland was to assign the note and mortgage back to defendant, and, if so shown, it would refute the question of payment to defendant of the Hogue note. The proposition itself shows he had no such right. The payment from Miles to defendant was bona fide, or it was not; and, if not, it was fraudulent. If it was fraudulent, defendant was a party to the fraud, and he will not now be permitted to use this fact to defeat plaintiff's action. If the payment was bona fide the payment was conclusively established. In either event, defendant is bound by the payment, and the case should be affirmed."

Upon this, the comment which I make is this: There was a certain transaction, as a result of which plaintiff is claiming that defendant is liable to her in trover for money. If the transaction had not occurred, she would have no foundation for her action. Defendant seeks to show all of it. She seeks to rely upon the transaction to the point where the facts, with certain alleged rules of law, benefit her. It was not a divisible transaction. To the demand that the whole

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transaction be shown, it is no answer to say that in its entirety it was probably intended as a fraud upon the creditors of Miles, or of the Miles Shoe Company. The court does not sit in this case to penalize the defendant for his fraudulent conduct, if it was fraudulent, nor to permit plaintiff to profit by such portion of it as appears to benefit her. The essential thing to be determined is whether defendant, in fact, ever collected any money for plaintiff which he refused to turn over to her. The history of the whole of the transaction in the course of which it is claimed that such a collection of money was made should have been admitted in evidence.

It seems to me to be unfortunate that the real, the meritorious, question in the case should not be considered in the majority opinion; that the case should be made to turn upon a ruling that an offer of counsel to produce testimony was too broad. I have pointed out that the defendant, by repeated rulings of the trial court, was denied the right to prove that he received no money on the checks, no money from any source, for the plaintiff. To those rulings exceptions were taken, and error is assigned upon them. These rulings, these exceptions, the majority of the court decline to even consider.

The judgment should be reversed and a new trial granted.

STONE, BIRD, and MOORE, JJ., concurred with OSTRANDER, J.

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COMMERCIAL STATE SAVINGS BANK *v.* STEVENS.

1. MORTGAGES—DISCHARGE—CONSTRUCTION.
   In the case of a mortgage for $1,500, which contained the proviso that when the indebtedness of the mortgagors should be reduced to $3,500 the mortgage should be deemed satisfied, the lien was not affected before such reduction, as security for the $1,500 for which it purported to be a lien.
2. SAME—PAYMENT.
   Where defendants had never made any claim that the mortgage had been satisfied and should be discharged, and the evidence showed only that the total indebtedness had been reduced to about $3,500 and the mortgage had been recognized as in force by a written agreement between the parties, the circuit court was justified in holding that it was not satisfied.
3. SAME—ADMISSIONS.
   And an admission of counsel for the complainant in his opening statement that the amount of loans and discounts upon which the defendants were liable had fallen in 1908 below $3,500, not including overdrafts, could not be treated as an admission that the entire indebtedness had been reduced below the amount stated.

Appeal from Montcalm; Davis, J. Submitted June 16, 1913. (Docket No. 92.) Decided March 28, 1914.

Bill by the Commercial State Savings Bank of Greenville against Egbert G. Stevens and others to foreclose a mortgage. From a decree for complainant, defendants appeal. Affirmed.

N. O. Griswold, for complainant.

R. A. Hawley, for defendants.

MCALVAY, C. J. Complainant filed its bill of complaint in the circuit court for the county of Montcalm, in chancery, against defendants, to foreclose a certain

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mortgage for the sum of $1,500, dated March 10, 1905, executed by defendants Egbert G. and Mary E. Stevens, upon certain property in the city of Greenville belonging to them and occupied as a homestead. This was the usual long-form mortgage, and contained the following express condition:

"Provided always, and these presents are upon the express condition, that if the said party of the first part shall and do well and truly pay, or cause to be paid, to the said party of the second part any and all sums of money that may at any time be due to the party of the second part, its successors and assigns, from either the party of the first part, or the firm of G. W. Stevens and Son, whether such obligation now exists or is hereafter created, whether the same consists of notes, endorsements, guaranties or overdraft, according to the terms and tenor of such obligations, as therein expressed, with interest as therein provided. But when the obligation of said E. G. Stevens and George Stevens & Son is reduced to thirty five hundred dollars and does not exceed that amount, this mortgage shall be deemed satisfied and shall be discharged."

The bill of complaint avers that the firm of G. W. Stevens & Son, at the time such mortgage was executed, were indebted to complainant in the sum of $5,000, upon notes, indorsements, guaranties, and overdrafts, and that this indebtedness was increased from time to time, and finally, on May 24, 1912, when said firm became insolvent and were adjudged bankrupts, amounted to $7,000; that many of their obligations and interest thereon, together with taxes on land mortgaged, are past due and unpaid. The bill prays for a determination of the amount due and for a sale of the premises. Defendant James Gracey is their trustee in bankruptcy. Defendants Egbert G. and Mary E. Stevens answered this bill of complaint, admitting the execution and delivery of the mortgage as alleged, but averring that after the execution of said mortgage during the year 1908, the indebtedness

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of Egbert G. and G. W. Stevens & Son to the complainant was reduced to less than $3,500, and thereby the mortgage by its own terms was fully satisfied and discharged; that if such indebtedness had never been so reduced, the mortgage could not be enforced as security for any sum of such indebtedness, except for the excess over $3,500. These defendants prayed in their answer, which was in the nature of a cross-bill, that the mortgage be declared fully paid and discharged, and that in case of a decree favorable to defendants, the mortgage be declared to be security only for amounts, if any, of indebtedness in excess of $3,500. A hearing was had before the court on the issue joined between complainant and defendants Egbert G. and Mary E. Stevens, which resulted in a decree in favor of complainant and against defendants, for the sum of $1,500 and interest from the date of such decree at the rate of 6 per cent. per annum. From this decree these defendants have appealed to this court.

The record shows that the firm of G. W. Stevens & Son, was composed of George W. Stevens and defendant Egbert G. Stevens, engaged in the hardware business at Greenville, Mich., and were the parties whose indebtedness was secured by the mortgage in question, and at the time it was given they were indebted to complainant upon notes, to the amount of several thousand dollars, which was represented by their several promissory notes, and by their indorsements and guaranties upon notes of their customers taken by them upon sales of hardware and discounted for them at complainant bank. At about the time of giving this mortgage defendant Egbert G. Stevens, as further security, assigned to complainant a life insurance policy, then estimated to have a surrender value of $500. It appears that G. W. Stevens & Son, after these securities were given, continued to do business with the bank in the same manner as before, and from that

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time up to April 20, 1908, their indebtedness to complainant, although fluctuating in amount from time to time, gradually increased until it amounted to the sum of $4,500, and at about this time a representative of the bank interviewed both members of the firm relative to further securities, and as a result, on April 20, 1908, George W. Stevens, the senior member of the firm, to further secure the firm indebtedness, executed and delivered to complainant a mortgage of $2,000 on his individual real estate, and also assigned to complainant a certificate of telephone stock of $500. On the same date, and as part of the same transaction, complainant and the firm of G. W. Stevens & Son made and entered into the following written agreement relative to this indebtedness to complainant, which on the part of the said firm was signed by Egbert G. Stevens:

"Articles of agreement made and entered into by and between the Commercial State Savings Bank, a banking corporation organized and existing under the laws of this State and having its place of business at the city of Greenville, county of Montcalm, and State of Michigan, party of the first part, and George W. Stevens and Egbert G. Stevens, copartners doing business under the firm name and style of G. W. Stevens & Son, of said city of Greenville, Michigan, parties of the second part, witnesseth as follows:

"Whereas said parties of the second part are indebted unto said party of the first part in the sum of two thousand (2,000.00) dollars or thereabouts upon their several promissory notes and the payment of which is already secured by mortgage and which is hereinafter referred to as the original individual indebtedness of said second parties and are also indebted to said first party as indorsers or guarantor of payment or collection in the sum of two thousand and five hundred ($2,500.00) dollars upon certain promissory notes or contracts of purchase taken by said second parties of third persons and sold and transferred by said second parties to said first party and which still remain unpaid and which are hereinafter referred to as commercial or collateral indebtedness and whereas said second parties have this day

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secured to the satisfaction of said first party the eventual payment and satisfaction of said commercial or collateral indebtedness, now therefore in consideration thereof said first party hath agreed and doth hereby agree to and with said second party as follows:

"*First:* That said first party shall from time to time as the same or any part thereof shall fall due extend or renew the said original or individual indebtedness of said second parties or such part thereof as they may desire for such term or terms as they may desire and not exceeding the period of three months.

"*Second:* That said first party shall from time to time as the same or any part thereof shall fall due extend or renew the several notes or obligations constituting the said commercial or collateral indebtedness for such term or terms as said second parties may desire and not exceeding the period of three months.

"*Third:* That said first party shall from time to time as said second parties may desire make loans necessary in the conduct of their business but not exceeding the sum of three hundred dollars in the aggregate and not for term to exceed ninety days at any one time.

"It is hereby understood and agreed by and between parties hereunto aforesaid that the said first party shall give said second party three months' notice whenever they see fit to have any or all of said second parties' obligation paid.

"Witness our hands the 20th day of April, A. D. 1908.

"COMMERCIAL STATE SAVINGS BANK,
"By CHARLES M. MILLER, Second Vice President.
"GEO. W. STEVENS & SON,
"By E. G. STEVENS."

Defendants and appellants contend that by the condition of the mortgage, already quoted, complainant acquired security only for so much of Egbert G. Stevens' and G. W. Stevens & Son's indebtedness to it in excess of the amount of $3,500 to the extent of $1,500 above such sum. A careful reading of this condition does not indicate to us that complainant was accepting security for anything less than the amount of

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$1,500 expressed in the mortgage. It is an express agreement on the part of the mortgagors to pay to complainant any and all sums of indebtedness, of the character described, that might be due to it at any time from defendant Stevens or his firm during the life of the mortgage. The last sentence of the condition which defendants rely upon to sustain their construction reads:

"But when the obligation of said E. G. Stevens and Geo. Stevens & Son is reduced to thirty-five hundred dollars and does not exceed that amount, this mortgage shall be deemed satisfied and shall be discharged."

It is clear that the intention of the parties as here expressed was that when these obligations were reduced to the amount named, the mortgage would be fully satisfied and should be discharged, but we do not find the expression of any intent that the operation of this mortgage as a security for the $1,500 was in any respect to be affected until that time.

The principal contention of defendants is that the record shows twice during the year 1908 the indebtedness of E. G. Stevens and George Stevens & Son to complainant, being the indebtedness mentioned and described in this mortgage, the payment of which was secured by it, was reduced to the sum of $3,500. The determination of the correctness of this contention requires a careful examination of all of the evidence in the record bearing upon this proposition. Upon the hearing of this cause neither these defendants nor George W. Stevens, the senior member of the firm, were sworn as witnesses. The only testimony introduced by them in the case was that of the son of defendants Stevens, who testified that the property covered by the mortgage in suit was the homestead of said defendants. Defendants, therefore, rely entirely upon the testimony on the part of complainant to support their contention above stated. The only witness in the case who gave any testimony relative to the con-

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tention that in 1908 this indebtedness was reduced below $3,500 was Mr. Miller, the vice president of complainant bank. He testified that the bank did not keep a liability register; that from the discount register he had found that in December, 1908, upon notes and discounts their liability was just a few dollars under $3,500, but that this computation was upon the face of the notes, and did not include interest on notes that had not matured, and did not take into account any overdraft; that he could not tell the exact overdraft at that time; that the books would not show it for the reason that part of it was very frequently kept as a cash item, and there usually was an overdraft. This is all the direct testimony in the case upon the subject.

Reliance appears to be placed by defendants upon the opening statement of counsel for complainant to the court as admissions that the amount of loans and discounts upon which defendants were liable during these transactions had, in 1908, fallen below the sum of $3,500. This statement was not unequivocal, but in terms was given "so far as can be gathered today from the discount register," and with the positive statement that it did not include overdrafts. It was not intended, and cannot be construed, as contended by defendants, as an admission that the amount of this indebtedness was reduced to $3,500. As bearing upon this question we find from the record that these personal notes of different dates and amounts were renewed from time to time, and consequently did not all become due at one time; also that during these transactions the notes and contracts turned over to complainant by these parties with their indorsements were small notes and numerous; that they arose from sales of hardware to customers in the course of trade; that from time to time they were paid; that sometimes they were renewed, and during all the time new notes were continually being indorsed and put into the bank and

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credited to G. W. Stevens & Son. It appears, also, that all of these were interest-bearing obligations. The record further shows that at no time before the commencement of suit was any claim made by these defendants that this mortgage was satisfied, and should be discharged.

The contract made between complainant and G. W. Stevens & Son April 20, 1908, which already appears in this record, and under which the parties acted from that date until the failure of the firm, is an admission in writing that this indebtedness at the time amounted to $4,500, and in terms recognizes the mortgage in question as in full force and effect. It appears in evidence that Mrs. Stevens, who was employed in the store of G. W. Stevens & Son much of the time during these transactions with complainant, and frequently did its banking, knew of and recognized that this mortgage was in force in October, 1911; that during that month she personally brought and delivered to complainant an insurance policy dated October 11, 1908, placed by defendant Egbert G. Stevens on these premises pursuant to the terms of the mortgage. Our conclusion from all of the evidence in the case is that it appears that the amount of the indebtedness secured by this mortgage was not at any time reduced to the sum of $3,500.

It appears from the record that beside the mortgage in suit of $1,500 and the life insurance policy of $500, complainant in 1908 required further security, and received a mortgage from G. W. Stevens of $2,000, and his telephone stock of $500, making all these securities $4,500. After the bill was filed, and up to December 20, 1912, there had been collected by complainant upon these securities, and upon some of the collateral notes, $1,452.72. Upon that date, which was but three days before the hearing, the entire amount of the balance due complainant upon personal and collateral indebtedness was the sum of $4,122.41.

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The trial court held that the mortgage in suit remained in force as a security for the full amount of $1,500, and granted complainant a decree for that amount, with interest at 6 per cent. per annum after the decree, together with costs to be taxed. A decree in the usual form, providing for a sale of said premises in case of default in payment of that amount, was duly entered. We agree with the learned trial judge in his construction of the condition of the mortgage, and also upon his findings upon the evidence.

It will not be necessary to discuss other questions presented.

The decree of the circuit court is affirmed, with costs.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

HILGBRANDT v. OVAL WOOD DISH CO.

1. MASTER AND SERVANT—FELLOW-SERVANTS—NEGLIGENCE.
   An employee of a wood products factory, who was a member of the crew which unloaded logs from cars in the yard and who knew the method employed in doing the work, assumed the risk of any negligence of his co-employees in the crew in failing to chain or bind up a car load of logs from which a portion had been removed, and he could not recover for injuries caused by logs being jarred off the car while it was being switched about.
2. SAME—RISKS ASSUMED—PERSONAL INJURIES.
   Where plaintiff and other members of the crew were all so situated that they knew how the work was done, and all the operations were apparent and the dangers obvious, plaintiff assumed the risk of the action of his foreman in

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taking plaintiff from his work of unloading and placing him in charge of the team which moved cars about, part of his duties being to stop the moving cars of logs by means of a block, which, when used, jarred off logs upon him.[1]

3. SAME—WARNING AND INSTRUCTING EMPLOYEE.

The direction of the foreman, changing plaintiff's work from unloading to driver of a team which transferred the cars from one skidway to another, without warning or advising plaintiff of the hazards of his work, did not effect such a change in employment as that it could be held to have taken plaintiff out of the scope of his employment, where other members of the crew had also been put in charge of the team.

4. SAME—FELLOW-SERVANT RULE—SUPERIOR SERVANT.

And the foreman was a fellow-servant of the plaintiff, although he had authority to hire and discharge men.

Error to Grand Traverse; Mayne, J. Submitted June 5, 1913. (Docket No. 34.) Decided March 28, 1914.

Case by Adelbert Hilgbrandt against the Oval Wood Dish Company for personal injuries. Judgment for plaintiff, and defendant brings error. Reversed, new trial denied.

Parm C. Gilbert and *Thomas Smurthwaite*, for appellant.

Covell & Cross, for appellee.

MCALVAY, C. J. This suit was brought to recover damages for an injury plaintiff claimed to have been caused by the negligence of defendant, and a trial of the issue resulted in a verdict against defendant, upon which a judgment was duly entered. The case is before this court for review, defendant and appellant

[1] As to servant's assumption of risk in obeying orders to perform obviously dangerous work, see note in 4 L. R. A. (N. S.) 830. And for servant's assumption of obvious risks of hazardous employment, see note in 1 L. R. A. (N. S.) 272.

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seeking a reversal on account of alleged errors committed upon the trial.

Defendant operated at Traverse City, Mich., a mill and factory in the production of wood dishes and other hard-wood products, principally from beech and maple sawlogs, which are brought to the factory on railroad cars and are delivered on a railroad siding which runs into defendant's logyard. These cars are placed by defendant's employees where required for sorting and unloading at the proper skidways; the cars being moved from place to place by a team kept for that purpose. The beech logs are placed upon the beech skidway and the maple logs upon the maple skidway, more commonly called the iron skidway. These skidways are about two car lengths from each other. The logs put upon the iron skidway are rolled into a pond of warm water, called "the soup hole," and from this place are taken up the slide into the factory for manufacture.

Plaintiff, at the time of his injury, was employed by defendant and was a member of the crew which had charge of unloading these cars and sorting these logs, moving the cars where desired, from place to place, for that purpose. The cars, after being unloaded, were moved some distance from the factory and left to be taken in charge by the railroad employees. All the movement of the cars after delivery by the railroad is done by a team of horses and one of this crew of men as a driver by hooking a chain to the car and pulling it along the track to the place where needed, the driver carrying a stick or block to drop in front of the wheels of the car to stop it as desired. This crew doing this work in the logyard usually numbered about six men.

The foreman of this crew, of which plaintiff was one, was Mr. Watson, who had worked for the defendant for some time and had a right to hire and dis-

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charge men, subject to the approval of the superintendent. This foreman scaled the logs, and the balance of the time worked with the crew, helping in different parts of the yard at whatever they were doing. The loaded cars were brought into defendant's yard on a side track by the railroad company, usually once a day, and about 15 loaded cars at a time. It was the duty of this crew each day to unload these cars. When they were delivered the cars were loaded, and the logs secured on the cars with chains just as they had been loaded and chained in the woods. These were flat cars upon which the logs were loaded, having stakes along each side 16 or 18 inches high. The cars were long enough to receive two lengths of logs, which were rolled on, covering the entire car. Over these logs binder chains were placed, fastened on each side, and upon them as many other logs were rolled as would finish the load, which top logs held the chains and bound the load fast. When the cars were unloaded they were moved to the skidways as stated, according to convenience, as the loads happened to be made up. If beech logs were on top the car would be moved first to the beech rollway, and all such logs unloaded as could be handily taken off, and then the car would be moved and maple logs unloaded at the iron skidway. In doing this unloading the logs were necessarily shifted around. When the top logs were unloaded the chains were untoggled to get at the bottom tier, which would be unloaded in such manner at such skidway as would be proper for that class of logs. As the cars were moved from place to place, after the binding chains had been unloosed, the remaining logs on a car would be rebound or not as in the judgment of those who were unloading seemed necessary. All of the members of this crew worked together, taking part in the different portions of the work necessary to be done to accomplish the unloading of these

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cars, each day. Plaintiff had worked as a member of this crew at this work in the logyard for about a month or six weeks before his injury. He had never before driven the team in moving cars. On the day in question he had been told by the foreman to drive the team. In doing this work he carried in his hand a stick, or block, which he selected for that purpose, which he used to block the wheels of the car to stop it at the proper place, when notified by the other men. This continued during the day until some time in the afternoon, when, in moving a car, which had been partly unloaded, from one of the beech skidways to the iron skidway, standing with his back toward the car, not looking at it or the logs on it, he used his block to stop the car at the proper place, jarring two of the logs off the car, which struck plaintiff on his legs, throwing him down on his face upon the ground, and caused the injury for which he seeks to recover.

The sole negligence charged by plaintiff and relied upon in the declaration is that he was put at work by the foreman outside the scope of his employment, with the dangers incident to which he was unacquainted, and without notice or warning of such dangers. The dangers referred to are that the cars were moved from one skidway to another after the binding chains had been removed, and some logs unloaded without refastening such chains to prevent logs from rolling off from the cars, and by reason of which negligence he suffered his injuries.

Appellant, in presenting its reasons why the judgment against it should be reversed, has grouped the errors duly assigned and relied upon, among others, as follows: The danger was obvious, and plaintiff assumed the risk. The negligence, if any appears in the record, was the negligence of fellow-servants. As has been said in the statement of facts, and as appears from the testimony of plaintiff, he was a member of

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this crew of men which unloaded the cars and decked the logs in defendant's yard for about a month before this accident. The skidways were alongside of the car track, and men on the cars rolled the logs off onto the skidways, where plaintiff and others decked them up (which means arranged them in tiers on the skidways). During all this time plaintiff, as one of this crew, assisted in and saw how the work was done. From his testimony he was not engaged in rolling logs from the cars, but in handling them on the skidways after they left the cars; for all the time he was engaged in such work he was situated where he could observe and know how the crew handled the logs in unloading a car and in doing all of the work in relation thereto.

In deciding a motion which was made at the close of plaintiff's case to direct a verdict for defendant, for the reasons that the dangers incident to the work were obvious and could be seen and appreciated by plaintiff, that the negligence, if any, was that of fellow-servants, which included the foreman, and on the ground of contributory negligence, the court, in denying the motion, among other things, found the following facts:

"In the business of defendant as conducted, it is shown conclusively, for the purpose of this motion, that the defendant had furnished a safe place and suitable appliances. That they were sufficient, if used, to insure the safety of the employees, barring unaccountable accident. The logs had been brought from a distance upon those same cars, and had been bound and held in place with the same chains and stakes. This applies until they arrived at the beech skidway. At this point the beech logs or a portion of them as was convenient were removed. For years—I assume from the evidence, those logs that remained on the cars had been moved a few feet to the iron skidway where the maple logs were unloaded from the cars. There is no question as to the competency of the men who unloaded those cars, and, as I said, there is no question as to

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the sufficiency of the appliances, nor as to the safe place, and there is no question but that the business had been conducted in such a way that no injury had befallen any workman, and no accident had occurred during all the years that the business had been run there. This was the condition on March 13th when the plaintiff was employed to drive the team which hauled the cars from the beech siding—skidway, to the iron skidway."

It is apparent that it is unnecessary to digest the testimony at length as to the character of this work and how it was performed. There is no question of safe place involved, nor of proper instrumentalities. There is no dispute in the testimony but that plaintiff and the other members of the crew were all so situated in performing this work as to know how it was done, and all of the operations could be seen and appreciated by the plaintiff. He must be held to have assumed the risk.

The record clearly shows that the foreman and the other members of the crew were engaged in a common occupation in unloading logs from the cars and placing them on different skidways in defendant's logyard. The several members of the crew helped with different parts of the work, and were changed from one place of the work to another as occasion required. Under the facts proven we think the relation of the foreman to the employer and men was like that of a section foreman, and that he was a fellow-servant with plaintiff within the decisions of this court.

The court was requested to charge that the foreman and other men were fellow-servants, and if there was any negligence on the part of either or any of them, it was the fault or negligence of a fellow-servant. It requires no citation of authorities to sustain the proposition that all of the members of this crew, except the foreman, were fellow-servants, and

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the authorities sustain the proposition that the foreman under such circumstances was a fellow-servant. *McClure* v. *Railroad Co.*, 146 Mich. 457 (109 N. W. 847); *Corey* v. *Iron Co.*, 151 Mich. 558 (115 N. W. 737), and cases cited.

The fact that on the day in question he was sent from the work on the skidway by the side of the car to drive team in moving the car cannot be said to have been beyond the scope of his employment. His testimony recognizes that he was one of the men engaged at this work, and moving the car was but a part of the work; the record showing also that this had been done by several of the men.

In deciding the motion referred to, and also in charging the jury, the court held that a custom had been established by this crew of men, in moving cars from one rollway to another, to do so without rebinding the load with the chains, and that plaintiff's claim was that he was ignorant of that custom, and therefore the court refused to take the case from the jury. We do not find in the declaration any such claim of negligence. The only ground of negligence, as already stated, was that plaintiff was not warned, in being put outside the scope of his employment, of the dangers attending the new work. If the declaration may be construed to include this ignorance of a custom, it is obvious from what we have said that the negligence was the negligence of one of plaintiff's fellow-servants. The learned trial judge was in error in not granting the motion referred to, and in also not charging the jury as requested.

For the reasons given, the judgment is reversed, and, as no different case can be presented under the admitted facts in this record, no new trial will be granted.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

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BERTHA *v.* REGAL MOTOR CAR CO.

PRINCIPAL AND AGENT—FRAUD—RELEASE.

Accepting as true plaintiff's evidence and giving it the greatest probative value, it appeared that his eye was injured in the employ of defendant because of a defective condition of its drill, that the medical adviser and legal counsel of its accident insurance company issuing a policy of indemnity insurance against accidents, by false representations as to the condition of plaintiff's eye, procured a release and settlement of his claim for $110 and medical expenses, that, finding his eye was blind and the other eye affected, plaintiff tendered back the amount received and sued for negligent injuries. *Held*, that by adopting the release, pleading it as a defense and having acted on it in other particulars, defendant ratified the fraudulent acts of the insurer's physician and lawyer so as to present an issue of fact whether the release was void for fraud.

Error to Wayne; Hally, J. Submitted June 4, 1913. (Docket No. 27.) Decided March 28, 1914. Rehearing denied June 4, 1914.

Case by Louis Bertha against the Regal Motor Car Company for personal injuries. Judgment for defendant on a directed verdict. Plaintiff brings error. Reversed.

Dohany & Dohany, for appellant.

Donnelly, Lyster, Brennan & Munro, for appellee.

MCALVAY, C. J. Plaintiff and appellant brought suit against defendant in an action to recover damages for injuries received by him while in its employment, whereby he lost the sight of one of his eyes, claimed to have been caused by the negligence of defendant. The case was brought on for trial before the court and a jury, and, at the close of plaintiff's case, on

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motion of defendant, a verdict was directed by the court in its behalf against the plaintiff. From a judgment duly entered upon this instructed verdict in favor of defendant, plaintiff has removed the case to this court upon writ of error.

In stating the facts in this case, this court will follow the well-established rule in cases of a judgment entered upon an instructed verdict against the appellant by giving the proof presented upon his part its greatest probative value.

The case presented by appellant shows that he was an "experienced, all around machinist," employed at the time as an automobile assembler by defendant; that the injury referred to occurred September 22, 1911, and was caused by a defective drill in an electric hand motor which he was then operating, which drill had been furnished plaintiff by the keeper of defendant's stockroom, upon the usual requisition in the due course of business; that immediately after this injury the stockkeeper took plaintiff in defendant's automobile from its factory to the office of Dr. Goux, a surgeon and eye specialist, who was employed by the London Guaranty & Accident Insurance Company, by which company defendant was insured against industrial accidents; that, after the examination, Dr. Goux ordered plaintiff removed to Harper Hospital, where he treated him until October 9th following, when he was discharged. During the time plaintiff was confined in the Harper Hospital under treatment by Dr. Goux, he was visited several times by Thomas Cotter, an attorney and claim agent employed by the London Guaranty & Accident Insurance Company, who talked with plaintiff relative to a settlement, and requested him to call at his office in the Ford Building as soon as he got out of the hospital.

The night before plaintiff left the hospital Dr. Goux called upon him and stated to him he would recover

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his eyesight in six or seven weeks, and could again go to work. The next morning, after plaintiff left the hospital, he went to Dr. Goux's office, where the doctor told him the same thing relative to recovering his sight, saying that he would see as well as ever in six or seven weeks. The same day he went to Attorney Cotter's office, as requested, and, while there, Mr. Cotter telephoned to Dr. Goux in the presence of and at the request of plaintiff, and, when he was through, told plaintiff the doctor said he would get his eyesight back in six weeks. Following that, within half an hour, negotiations for a settlement were closed for the sum of $110 cash, hospital and doctor's bills not to exceed $100, and plaintiff, at Mr. Cotter's request, signed a full release and discharge to the defendant Regal Motor Car Company, from all claims for damages against it by reason of injuries sustained from the accident in question, which writing is in words and figures, as follows:

"For and in consideration of the sum of one hundred and ten ($110.00) dollars to me in hand paid in cash and the payment of my hospital and doctor bills not to exceed the sum of one hundred ($100.00) dollars, making a total of two hundred and ten ($210.00) dollars by the Regal Motor Car Company, receipt whereof is hereby confessed and acknowledged, I, the undersigned do hereby release, discharge, forever quit-claim and set over unto the said Regal Motor Car Company any and all claim, claims, action, actions or causes of action which I now have or may hereafter have against the said Regal Motor Car Company by reason of an accident which occurred to me on or about the 22nd day of September, A. D. 1911, at the plant of the said Regal Motor Car Company in the city of Detroit, in which accident I sustained injuries, personal or otherwise.

"In further consideration of said sum or sums, I, the undersigned do hereby release and discharge the said Regal Motor Car Company from any and all claims for damages which I now have or may hereafter have against the said company by reason of any

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act or thing heretofore done. This release to benefit all persons, firms, or corporations chargeable with negligence or liability in the premises.

"In witness whereof I have hereunto set my hand and seal, this 9th day of October, A. D. 1911.

[Signed] "LOUIS BERTHA.

"Witnesses:

"HARRY HANFORD.

"THOMAS M. COTTER."

Plaintiff learned very soon afterwards that the sight of his right eye was totally destroyed, and that there was strong probability of a sympathetic injury to the left eye. He immediately caused the sum of $110, with interest, to be tendered back to defendant company. Through its president this tender was refused, and suit was at once instituted.

To the declaration in the case defendant promptly pleaded the general issue, with the following special notice of defense:

"To said Plaintiff:

"Please take notice that on the trial of the above-entitled cause the said defendant will offer evidence to prove and insist upon in its defense that, if the said plaintiff ever had any claim or cause of action against the said defendant, as in plaintiff's declaration alleged, that the same has been fully satisfied and discharged, and full receipt, release, discharge, and quittance given therefor by the said plaintiff to the said defendant."

During the presentation of proofs on the part of plaintiff, and before directing a verdict for defendant, the court, upon separate motions made by defendant, had excluded and stricken out all the testimony of the plaintiff relative to statements and representations made to him by Dr. Goux and Thomas Cotter, also all the testimony of the witness Cotter relative to the part he had taken in the matter in soliciting and securing a settlement and the release which is in evidence; all for the reason that there was no evidence in the case connecting the acts and doings

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of Dr. Goux and Mr. Cotter with the defendant company.

At the close of plaintiff's case, defendant moved for an instructed verdict, the matter having been argued before the court in the absence of the jury before the formal motion was made. The court granted the motion, giving his reasons therefor in the following language:

"But we are not concerned with whether there was fraud or whether there were misstatements in this particular case, because the parties who made these statements, in so far as the testimony goes, have not been shown to be connected with the defendant, the Regal Motor Car Company. There has been testimony introduced here in your absence which shows an agency, but that the agency was of such an extent as would warrant a connection between the defendant and the plaintiff in so far as these representations were made in connection with the alleged settlement, there isn't anything at all in the testimony which would justify us in concluding that was so. Consequently this man accepted the payment of the money, and he cannot now sue a second time for that which he received at another time in full for his compensation, and your verdict will be a verdict for the defendant of no cause of action."

Exceptions were taken to and errors assigned by appellant upon the foregoing holdings of the court, and upon the final direction of a verdict in favor of defendant and against plaintiff. As all of the assignments of error are based upon these rulings of the court which were had upon the sole ground of the insufficient showing on the part of plaintiff of such a relation between Dr. Goux and Mr. Cotter and the defendant in the case to constitute an agency or any authority to act on their part to bind defendant, they will be considered collectively.

Appellant relies upon the application of the doctrine of ratification and estoppel. Considering the evidence on the part of plaintiff as true, there can

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no doubt or question arise but that plaintiff has shown beyond a peradventure a serious injury caused while in the employment of defendant; that he was taken from defendant's factory to Dr. Goux's office by one of defendant's employees in defendant's automobile, and from there, by order of Dr. Goux, was taken to and cared for at Harper Hospital as the doctor's patient from the 22d of September to the 9th of October, 1911; that, while he was in the hospital, Attorney Cotter called several times to see him, talked about settling for his injury, and invited him to come to his office; that Dr. Goux assured plaintiff he would recover his eyesight as good as ever within six or seven weeks, and so told Cotter, who repeated the telephone message to plaintiff; that plaintiff, relying upon such assurance, was induced by Cotter to accept $110 in full satisfaction for his injury, and signed a full release to the Regal Motor Car Company, this defendant.

It is an accepted fact that both Dr. Goux and Mr. Cotter were the representatives of the insurance company which had issued industrial accident policies in favor of defendant which were then in force; and it is also an accepted fact that the release which was secured from plaintiff by Cotter was in terms for the benefit of defendant company alone, which, by such release, if valid, was freed from any and all liability on account of the injury which plaintiff had suffered. Without reference to any active fraud on the part of the two representatives of the insurance company, it is apparent that the amount which plaintiff was induced to accept was insignificant compared with the extent of the injury he had suffered, and plaintiff's testimony shows that it amounted to fraud in law.

Appellant contends that defendant has ratified and adopted the acts of these representatives of the insurance company. The pleadings and evidence in the

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case disclose the following facts relative to defendant's attitude toward and relation to the release: Soon after accepting the money and signing the release to defendant company, plaintiff discovered that he was totally blind in his right eye, and at once repudiated the settlement by making a full tender of the amount he had received to the president of defendant company. Defendant refused to accept this tender. To the declaration immediately filed (October 10, 1911) as commencement of suit, defendant, on October 21, 1911, filed with its plea a notice of full reliance upon the release and discharge given to it by the plaintiff in defense of any claim or cause of action plaintiff ever had against it. The release is in the record, a written instrument given to defendant in its corporate name, uncontradicted and unexplained, produced upon the trial by defendant's attorneys and used by them upon their cross-examination of plaintiff, concerning which the record shows that they presented the release to plaintiff, had him identify his signature, and testify that it was signed and given by him to the defendant company upon payment to him of the sum of $110, and the defendant company agreed to pay his hospital and doctor's bills, and proceeded at great length with such cross-examination to unequivocally fix the fact that the defendant had settled with him in full, and been released from all claim of every kind arising from the injury he had received for which the suit was brought; and they stated, in answer to a charge by plaintiff's attorney, that defendant had paid Dr. Goux for his services, that it was immaterial, that it was paid by defendant as part of the release, and they admitted it.

It is a proposition of law too fundamental and too well established to require a citation of authorities that, if a party adopts even unauthorized acts of another, and has received and accepted benefits accru-

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ing therefrom, he thereby adopts and ratifies the instrumentalities by which the results were obtained, and is estopped from denying that the agent was authorized to act. So in this case, by accepting this release, which upon its face is prima facie a release in its favor and for its sole benefit, by pleading the release as a defense to the suit, by refusing to accept the tender back of money which has been paid to secure the release, by its course of cross-examination to show that it had obtained the release and claiming the benefits of it, by admitting in open court that it had paid Dr. Goux for his services in caring for plaintiff, defendant must be held to have adopted and ratified the acts of the two representatives of the insurance company. Upon this record, the court was in error in striking out the testimony referred to, and in directing a verdict in favor of defendant.

As already stated, and as appears by the excerpt from the charge of the court directing a verdict in the case, the sole question considered and passed upon by the trial judge was the question of the relation of Dr. Goux and Mr. Cotter in this transaction to the defendant company, and this is the only question now before this court for determination. This is not an indirect attack upon this release in a collateral proceeding, nor are we called upon at this time to determine the question of the duty of inspection of the tool, the breaking of which caused this injury, or the negligence of either of the parties to the litigation.

For the reasons herein stated, the judgment of the circuit court is reversed and set aside, and a new trial is ordered.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

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SIEVERS *v.* BARTON.

ASSAULT—CIVIL ACTION—PROVOCATION—CHARGE.

Although plaintiff provoked an assault in which he was injured by defendant, the court properly instructed the jury, in an action for the injuries caused by defendant, that the punishment inflicted was unwarrantably severe, submitting to them the question of damages only, upon testimony that the defendant entered plaintiff's yard in a threatening manner, and, when plaintiff struck him, knocked plaintiff down and severely bruised and cut him.

Error to Wayne; Van Zile, J. Submitted June 19, 1913. (Docket No. 20.) Decided March 28, 1914.

Case by Gustave Sievers against Irving W. Barton for trespass *vi et armis*. Judgment for plaintiff. Defendant brings error. Affirmed.

William D. Ellsworth, for appellant.

William Look, for appellee.

MCALVAY, C. J. This case was brought in justice's court in Wayne county by plaintiff in an action of trespass, claiming damages for assault and battery committed on him by defendant. It was appealed to the circuit court, and a trial before a jury resulted in a verdict in favor of plaintiff for the sum of $85. The case is brought to this court for review upon writ of error by defendant.

The parties to this suit lived in the city of Detroit upon adjoining premises, and apparently not with very friendly relations toward each other. In May, 1911, plaintiff, who was at work digging with a spade in his garden, with his wife near him, remarked to her that "somebody got a licking." He said this within the hearing of defendant's wife, who was sitting in her back yard. The cause of this remark

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was that an adopted daughter of defendant was being punished by him in the house, of which plaintiff knew nothing except the resulting noise. Defendant's wife suggested to plaintiff that he mind his own business. Plaintiff then, after such remark, placed his thumb to his nose, describing an arc of a circle with his fingers. Defendant, having heard voices, appeared at his door while plaintiff was thus exercising his hand, and demanded why he insulted his wife, and, as plaintiff claims, at once jumped over the dividing fence into plaintiff's yard, coming at him in a threatening manner; in self-defense, expecting an attack, plaintiff struck him with the handle of his spade, whereupon defendant struck plaintiff several severe blows, knocked him down, and gave him a severe beating.

Defendant's version of the circumstances is that he came out of his house, got upon this fence, and asked plaintiff what he meant by that motion to his wife, when plaintiff struck him with the spade; that he grabbed it and was pulled over the fence by the plaintiff into his yard, and struck plaintiff in defending himself.

It does not seem to be disputed but that plaintiff was considerably injured. The doctor who was called testified he was bruised about the face and had a cut on the left temple down to the bone, which required stitches to close it. This he did with the assistance of another doctor, who administered the chloroform. Plaintiff was a bookbinder, receiving $19 a week, and lost seven working days. He paid for the services of the two doctors, according to their testimony, $40.

The errors assigned and relied upon by appellant relate to refusals to charge as requested and to certain portions of the charge of the court. The substance of the requests of defendant which should have been given were included in the main charge of the court and relate to the fundamental principles of law

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applying to such a case. As to the portions of the charge objected to, we find from an examination of the record that the court, under the undisputed evidence in this case, was justified in charging the jury as he did, indicating that the punishment which defendant inflicted upon the plaintiff was unwarranted, and leaving only the question of damages to the jury.

The judgment of the circuit court is affirmed.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

JEWELL v. KELLEY.

FRAUDULENT CONVEYANCES—ACCOUNTING—HUSBAND AND WIFE.

Evidence that defendant had transferred to his wife his real property and personalty in defraud of his creditors, that she had paid out to satisfy his creditors several amounts, proved by vouchers and undisputed testimony, and that she was entitled to exemptions to be credited to her on an accounting, *held*, to show a balance due of $211.19 for which she should be held liable to a judgment creditor.

Appeal from Allegan; Padgham, J. Submitted October 13, 1913. (Docket No. 30.) Decided March 28, 1914.

Bill by Fred Jewell against Josie Kelley and Michael Kelley in aid of execution and for relief against certain voluntary conveyances. From a decree for complainant, defendant appeals. Modified and affirmed.

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Charles R. Wilkes, for complainant.

Charles Thew, for defendant.

MCALVAY, C. J. Complainant filed a judgment creditor's bill, and also in aid of execution against defendants, upon which a decree was granted in his favor. From that decree an appeal was taken to this court, where the decree was modified. The opinion handed down at that time, written by Mr. Justice HOOKER, appears in 155 Mich. 301 (118 N. W. 987), where an extended statement of facts is made, to which reference is had for a complete understanding of the case. We need only to state in this opinion that defendant Michael Kelley, before the filing of complainant's bill of complaint, had transferred his real estate to his wife, defendant Josie Kelley, and also certain of his personal property at the same time, which transfers were both attacked as voluntary, and made with intent to hinder, defraud, and delay creditors. The decree of the circuit court sustained the contention of complainant, and set aside the transfer of the real estate and also of the personal property as fraudulent. This court decreed that the transfer of the real estate to defendant Josie Kelley by her husband was valid, reversing the decree in that regard, and sustained the decree of the circuit court as to the personal property. The case was remanded for further proofs, as follows:

"And it appearing from the record that the said defendant Josie Kelley has disposed of a large part of the personal property in said bill of sale described, and that but a small part, if any, of the personal property aforesaid is now in the possession of the said Josie Kelley, it is further ordered, adjudged, and decreed that said cause be referred back to the circuit court for the county of Allegan, in chancery, to take proofs of the amount and value of the personal property disposed of by the said Josie Kelley belonging to the said Michael Kelley for the purpose of deter-

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mining the amount justly due complainant from the said Josie Kelley for the value of the personal property so converted, used, or disposed of by her."

Since the remand ordered by this court the cause has been reheard in the circuit court upon further proofs taken upon the question specified in the remanding order and decree of this court, and by stipulation the proofs taken in the former hearing were considered. A decree has been granted and entered in favor of complainant, which contains the following finding and determination:

"Said Josie Kelley has disposed of, used, and converted of the personal property of the said Michael Kelley in the said bill of sale referred to property of more than the value of $397; that being the amount due from the said Michael Kelley to the said Fred Jewell on the judgment in the bill of complaint described. And it is further ordered, adjudged, and decreed that the complainant is entitled to recover of and from the said Josie Kelley for fraudulently converting (the) personal property aforesaid, the amount due upon said judgment, namely: The sum of $397."

Defendant Josie Kelley has appealed to this court from this decree.

Appellant contends that the court, in arriving at the amount to be charged against her in this accounting for this property, which came into her hands under this bill of sale, has not given her the amount of credits she is entitled to from the evidence in the case, and claims that on a legal and equitable accounting there will remain nothing of this property, or its proceeds, in her hands upon which a personal decree against her can be based.

The court, when the case was here before, as stated, determined that the bill of sale of Michael Kelley to Josie Kelley was fraudulent and void as to complainant, and subjected the property described therein to complainant's claim. In the decree remanding the

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case but one issue was left undetermined, and that was to find the amount and value of this personal property converted, used, or disposed of by said Josie Kelley belonging to Michael Kelley. As was stated in the decree of this court:

"For the purpose of determining the amount justly due complainant from the said Josie Kelley for the value of the property so converted, used, or disposed of by her."

The learned circuit judge filed an opinion in the case in which he determined the total amount due complainant upon his judgment against defendant Michael Kelley, together with interest and costs, was the sum of $397. He also found that defendant Josie Kelley was entitled to her statutory exemptions, and also for the value of the horse and pigs described in the bill of sale which died prior to the bringing of this suit, and should also be allowed for payment made by her of the chattel mortgage upon the property at the time of the bill of sale, and for other items which, from the evidence, he found she was entitled to credit; being for payments of debts of defendant Michael Kelley out of the personal property received by her under the bill of sale. After deducting all these items, he determined the amount of the value of the balance of such personal property which she had received on said bill of sale, and had converted, used, or disposed of unlawfully and fraudulently, as against this judgment creditor, to be considerably larger than $397, the amount found due complainant on his judgment, not stating the exact amount, and ordered a decree to be entered against her in complainant's favor for such sum of $397, with costs.

All of the evidence in the old and new records, which was considered by the trial judge in arriving at his determination, has been carefully examined and considered. While we agree with the trial court as to the nature of the credits which should be allowed

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to defendant Josie Kelley, our conclusion from the evidence is that all payments made by her upon the debts of Michael Kelley for which she would receive credit have not been included. It will not be necessary to go into the details of this evidence. We accept the amount with which she should be charged as listed and stated in complainant's original brief, based upon complainant's testimony, to be correct, namely, the sum of $667.50. This amount includes the value of the bay horse she now claims, but which was included in the bill of sale, and which we find was the property of Michael Kelley.

We agree with the trial court in giving her credit for her statutory exemptions, the value of the horse and pigs which died before suit, the amount of the chattel mortgage which she paid, and only disagree in the amount of the other items for which she is entitled to credit, paid out of this personal property by her to settle debts of Michael Kelley, which she has established conclusively by her uncontradicted testimony and the written vouchers showing payments. The total amount of her entire credits we find to be $526.71, which, deducted from $667.50, the amount which complainant claims should be the basis of the accounting, leaves $140.79 to be charged against her. Adding interest at 5 per cent. for 10 years, $70.40, makes the total amount to be charged against her the sum of $211.19, for which she is liable to complainant, and for which he is entitled to a decree against her.

The decree of the circuit court will be so modified, and a decree for that amount will accordingly be entered in this court. Defendant Josie Kelley will recover costs of this court, to be taxed.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

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OUTHWAITE *v.* GUNN.

1. EJECTMENT—BOUNDARIES—ADVERSE POSSESSION.
   Where plaintiff brought ejectment to recover a strip of land two or more inches in width next to her lot which defendant had occupied with a foundation wall and its footings, it was not a defense to the action that the defendant did not claim to occupy the land adversely and before plaintiff brought action promised to remove the footings of the concrete wall. The court erred in assuming as a part of its instructions that the occupancy was not unlawful if not adverse to plaintiff.[1]

2. SAME—ABANDONMENT.
   And a recovery in ejectment is warranted although defendant abandoned his occupancy, if he held possession at the time suit was commenced.

3. SAME.
   And under conflicting evidence it was error for the trial court to hold that the footings of defendant's wall did not extend upon plaintiff's land and to determine as matter of law which of the surveys was correct.

Error to Muskegon; Sullivan, J. Submitted November 12, 1913. (Docket No. 91.) Decided March 28, 1914.

Ejectment by Blanche C. Outhwaite against Charles L. Gunn. Judgment for defendant. Plaintiff brings error. Reversed.

William Carpenter, for appellant.

Cross, Vanderwerp, Foote & Ross, for appellee.

MCALVAY, C. J. This is a suit in ejectment brought by plaintiff against defendant to recover a strip of land six inches wide on the south side of her premises

[1] As to ejectment for encroachments under surface or overhead, see note in 11 L. R. A. (N. S.) 917.

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in the city of Muskegon upon which plaintiff claims defendant has encroached and now occupies with the basement or foundation wall of his building, and its footings. The case was tried before a jury and resulted in a verdict in favor of defendant, upon which a judgment was duly entered. Plaintiff brings the case to this court for review.

The facts in the case are that the parties to this suit own and occupy adjoining lots in the city of Muskegon located upon block 32, of Newell's Enlarged and Corrected Plat of the city of Muskegon. This plat is not laid out according to the points of the compass, but Pine street runs through it northwesterly and southeasterly in front of these premises, and Walton street crosses Pine street on the south side of block 32, running northeasterly and southwesterly, intersecting Pine street at its southeasterly corner, and runs along the south side of said block. Plaintiff owns lot 11, and the defendant owns lots 12 and 13 next south of her lot; each of these lots being 22 feet in width, and all fronting on Pine street and extending westerly to an alley in the block. Lot 13 is in the southeast corner of the block, and its south line extends westerly along the north line of Walton street.

Defendant, in 1906, erected a two-story concrete building on lots 12 and 13 intended to cover their full width, extending from the west line of Pine street westerly about two-thirds their depth. He also built a two-story brick building west of the concrete building on these lots facing Walton street extending from the westerly end of the concrete building to the east line of the alley in the rear of these lots and in depth intended to extend from the north line of Walton street the full width of said lots 12 and 13. Plaintiff, intending to erect a building on her lot 11 facing Pine street the full width of said lot, had begun excavating and had gone down below the street line on the side

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next to defendant's north wall 7 or 8 feet, when it was discovered that his basement wall, as she claims, for its full length, encroached upon her premises at least 2 inches and the footings under such wall encroached about 6 inches. Defendant was notified, and this suit was begun. Construction of her building proceeded, she having let a contract, and her contractor, employed by defendant for that purpose after this suit was commenced, broke off the concrete footings even with the north side of his (defendant's) foundation or basement wall and built the south wall of plaintiff's building against defendant's foundation wall up to the top of it, where the north wall of the superstructure of defendant's concrete building begins. This left a space of 2 inches between the south side of her wall and the north side of defendant's wall above his foundation, caused, as plaintiff claims, by his encroachment of 2 inches upon her land with his entire basement wall. The south wall of the superstructure of her building was then erected upon a plumb line and met defendant's wall at or above the beginning of her second story, by reason of the leaning of his wall out of a true line toward the north. The rear wall of the brick building extends 1 inch beyond the north wall of the superstructure of the concrete building and its foundation extends about 3 inches beyond. This was the condition at and before the time this suit was brought.

Defendant was informed of the fact that his buildings encroached upon plaintiff's land, and he promised to remove the footings. The testimony shows there was a dispute as to whether he made this promise before or after suit was begun. The footings were not removed until some time after. During the course of the construction of the plaintiff's building, it was found that the porch floor extended about 4 inches and the porch roof extended about 8 inches over the plain-

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tiff's land. It was necessary to cut these off in order to put up the wall. It appears to be admitted that the superstructure of defendant's building where it meets the top of the basement wall is exactly on the north line of his lot, No. 12. There is testimony in the case tending to show that the basement wall is 2 inches farther north than this wall and that the footings extended from 3 to 6 inches farther north.

The errors assigned relate entirely to the instructions of the court to the jury. Relative to the removal of the footings of the north wall of defendant's concrete building, the court instructed the jury that plaintiff could not recover provided the jury found that defendant's promise to remove these footings was made before the bringing of suit. The jury was further instructed that they had nothing whatever to do with the footings that were there at the time of the trial. Both of these instructions are claimed by plaintiff to have been erroneous.

The undisputed evidence in this case shows that the footings under the north wall of defendant's concrete building extended several inches beyond the north side of the foundation wall onto plaintiff's lot. Defendant so testifies, claiming that before suit was commenced he promised to remove them. No promise is claimed to have been made relative to other claimed encroachments.

There is no dispute in this case relative to the ownership of these adjoining properties. The only question involved is whether the defendant at the time of the commencement of suit against him was in the occupation of a narrow strip belonging to plaintiff's lot next north of the north line of his lot, No. 12. That he made a promise at some time to have these projecting footings of the basement wall of his concrete building removed is not in dispute, although the time when it was made is disputed. The evidence is clear

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that they were not removed until some time after the suit was commenced.

The court, in giving the first of these instructions above stated, evidently considered that on account of the promise made by him defendant was not occupying adversely to plaintiff. In this the court was in error for the reason the plaintiff claimed that not only were the footings of this wall unlawfully upon her property, but also that the entire basement wall of the concrete building encroached upon her premises at least two inches, and that the basement wall and its footings of the brick building encroached a considerable distance further; also, for the further reason that defendant's occupancy of any portion of her premises was unlawful even though not adverse. *Rose* v. *Linderman*, 147 Mich. 372 (110 N. W. 939, 11 Am. & Eng. Ann. Cas. 198).

If defendant was in possession at the time suit was brought, plaintiff can recover even if he afterwards abandoned it. *Archibald* v. *Railroad Co.*, 1 App. Div. (N. Y.) 251 (37 N. Y. Supp. 336); *Comfort* v. *Ballingal*, 134 Mo. 281 (35 S. W. 609).

The plaintiff was entitled to have all of the evidence in the case as to defendant's occupation of plaintiff's premises submitted to the jury, which included a consideration of whether or not the walls of these buildings and the footings under the walls along the entire line of her lot were north of that line. The court was in error in charging the jury in the manner stated upon both propositions.

Further error is claimed, in that the court charged the jury that the true foundation line between the two lots is the line on the north line of the general foundation under the brick building that was located by Mr. Gunn. In this matter the court was in error. We do not find in the record that Mr. Gunn testified at all relative to the wall of the brick building. It

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was for the jury to determine the effect of defendant's testimony as to where the north line of his lot was, as such testimony was capable of being construed to relate to the north line of his superstructure, which might be considered by the jury in connection with other testimony in the case that his foundation wall along the entire north side of his concrete building extended two inches north beyond the superstructure.

As the case must go back for another trial, it is only necessary to say, relative to the testimony of the surveyors which was taken from the consideration of the jury, that there was material testimony given by the city surveyor as to the establishment of the section line from which the survey of these premises started, which, if followed up, by the testimony of his assistants, should be considered by the jury. The county surveyor, Abbott, gave substantive testimony to the fact that the width of the concrete building of defendant north and south measured by him was 44 feet and 2 inches. It was error, in any event, to take that portion of his testimony from the consideration of the jury.

For the errors pointed out, the judgment of the circuit court is reversed, and a new trial granted.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

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ANDREWS *v.* TAMARACK MINING CO.

1. MASTER AND SERVANT—MINES AND MINING—SAFE PLACE.

Decedent was employed in defendant's mine as a "hitch cutter," making holes to receive timbers set in them to support the wall or overhanging rock. While the men were engaged in the usual work of timbering the roof of a stope in the mine, and making it safe for the miners, part of the rock fell and rolled upon decedent, killing him. It appeared that all the loose rock had been barred down and the place declared safe, everybody there considering it so: and that plaintiff and his coworker had observed the progress of the work and proceeded to cut the hitches as was usual, believing it safe. The miners had been cautioned against working in dangerous places and were at liberty to withdraw or to take all necessary precautions to render the stope safe. *Held*, that the defendant was not charged with the obligation of furnishing decedent with a safe place in which to work so as to make defendant liable for his death.[1]

2. SAME—DANGEROUS PLACE—NEGLIGENCE.

On a previous trial of the case the superintendent had testified that the overhanging wall often broke and fell when it appeared to be safe, and in the space of a few minutes. The testimony of the witness who had died was not introduced on the second trial. *Held*, that without evidence to support this contention the case should have been taken from the jury and a verdict directed for defendant.

Error to Houghton; Cooper, J. Submitted November 13, 1913. (Docket No. 104.) Decided March 28, 1914.

Case by Grace E. Andrews, as administratrix of the estate of Nicholas J. Andrews, deceased, against the Tamarack Mining Company for the unlawful kill-

[1] The question of the applicability of the rule as to safe place where servants are engaged in the work of removing dangerous conditions is discussed in a note in 25 L. R. A. (N. S.) 321.

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ing of plaintiff's intestate. Judgment for plaintiff. Defendant brings error. Reversed; new trial denied.

Allen F. Rees, for appellant.

A. W. Kerr (A. T. Streeter, of counsel), for appellee.

MCALVAY, C. J. Plaintiff, as representative of her deceased husband, recovered the present judgment in this case against defendant for injuries resulting in his death, charged to have been caused by the negligence of defendant.

This case was first before this court in the April term, 1897, where a former judgment in favor of plaintiff was reversed by a majority opinion and a new trial ordered. No further prosecution of the case was had until October, 1912, when a second trial occurred, which resulted in the judgment now before this court for review.

For an extended statement of facts in the case, reference is had to the opinions in *Andrews* v. *Mining Co.*, 114 Mich. 375 (72 N. W. 242). In the present opinion only such facts as are sufficient to an intelligent understanding of the case need be stated.

Plaintiff's decedent was a miner of 20 years' experience. He had worked in Michigan copper and iron mines for several years, and had previously worked in defendant's mine for about one year. At the time of the accident, he had for a second period worked in this mine for several weeks. He was a man of more than ordinary intelligence, and in mining, which had been his life work, he was an expert, and had at times held positions of trust, having been at one time a captain. At the time of the accident he was working as a "hitch cutter" with a man named Trevarrow. "Hitch cutters" work in pairs, cutting holes, called "hitches," in the rock of the foot wall of the "stope," or tunnel, of the mine. One of the

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pair holds the cutting tool, and the other strikes with a sledge. These holes receive the lower ends of pieces of timber which are set upright in sets of three, called batteries, and are driven in tight against the top, or hanging wall, of the stope to prevent rock from falling down. These sets of timbers are put in about seven or eight feet apart as the drilling and mining of the "stope" advances. The "stope" rises at an angle towards the level above as it is mined out. In this "stope" the vein of ore, which was perfectly hard and safe to work in, required drilling and blasting. It was first mined out on the lower half of the vein near the foot wall, and then the upper half up to the hanging wall, so that in mining the stope was usually driven in further on the foot wall than overhead. The rock above the vein of ore was brittle, which necessitated that it be timbered in the manner described, and this mining was known and understood to be more than usually dangerous. The work of the "hitch cutters" and putting in the timbering into the "stope" advanced as the ore was mined out, exposing the rock roof, and they were continually making the place safe. It was their duty to examine and see that everything was safe before going to work, and, if the "hitch cutters" examined and found it was not safe for them to work, they should take time to make it safe and have men, if they needed them, to help make it safe. This "stope" was on the sixteenth level, and had been worked in about 60 feet along the course of the level and up near enough to the fifteenth level to cut a hole through for purposes of ventilation.

On the morning of the accident, the two miners had for about two hours been at work in this place, using their bars on the hanging wall, or roof, breaking down the "loose" and testing it for safety. Then came four or five timbermen, and also the "hitch cutters." These timbermen set up the timbers and drive them into

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place after the "hitch cutters" have cut the "hitches." On this occasion they also, with the two miners, continued for an hour or more after they came there to work at the rock above, including that which later fell, and broke down all that was loose or which they could break down. The hanging wall was then pronounced safe, and the testimony of all the witnesses is that everybody considered it safe.

During the time the miners and timbermen were at work with their bars, they had sufficient lights, and during this time Andrews and Trevarrow were present, standing or sitting behind the men who were doing this work, observing all that was done. When they finished, the timbermen pronounced the place safe and went to work. The miners also began to set up their machine to proceed with the drilling. The testimony of Trevarrow is that he and his partner, Andrews, were fully convinced that the place was safe to go to work in, and the head timberman told the "hitch cutters" that they could go to work, everything was safe. They at once began cutting "hitches," and had worked about one hour, when suddenly a large piece of rock fell down and, rolling, crushed Andrews and injured Trevarrow.

The main contention of defendant is that, under the evidence in the case, a verdict should have been directed in its behalf, for the reason that there was no evidence of defendant's negligence with respect to plaintiff's decedent; and that there was a clear and absolute assumption of risk by plaintiff's decedent. Errors are also assigned upon the admission of certain testimony, and upon some portions of the charge.

When the case was first before this court, it was reversed only on account of the improper admission of certain testimony, given at the inquest, of the mining captain, Maslin, who had charge of the underground work of this mine, introduced, not for the

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purpose of impeachment, but to prove the substantive fact that defendant, through its agent (the captain), had knowledge of the danger and should have warned plaintiff's decedent. The majority opinion, Mr. Justice LONG speaking for the court, probably for the purposes of a new trial, although it is not so stated, in considering one of the contentions made by plaintiff's counsel, reads:

"But counsel for plaintiff contend that the place was made dangerous by the excavation's being worked too far under, and left too long a time, without putting in the sets of stull timbers, as was usual; that this was done under the direction of Capt. Maslin, who knew that if too great excavation was made, and the timbers not at once placed, the hanging walls, being left exposed, would crumble or break off and fall; that he, knowing this, sent the men in without warning them of the dangerous condition. We think there is some evidence to sustain this contention. Mr. Parnall, the superintendent of the mine, testified that oft-times, when the overhanging wall appeared safe, it would suddenly break off and fall, and this within the space of a few minutes. * * * While the evidence is not very clear upon this question, we are not able to say that there is no evidence of that fact." *Andrews* v. *Mining Co.*, 114 Mich., at page 381 (72 N. W. 244).

This conclusion of the court was based entirely upon the testimony of the captain and the superintendent of the mine, who have both died since the former trial, and whose testimony, then taken, was not introduced by either party upon the last trial. Appellant alleges that the case now before the court for consideration is therefore an essentially different one from that which was passed upon on the former hearing, and that, in view of the evidence in this record and the undisputed duties of plaintiff's decedent which he was employed to perform, there is no evidence in this case of defendant's negligence. We have already briefly stated these duties in this opinion and

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find, upon an examination of both opinions handed down on the former hearing, that the entire court agreed as to these duties of plaintiff's decedent.

Quoting again from the majority opinion, we find as follows:

"Under the method adopted by the defendant company, these hitch cutters were required in all cases to examine all places where they might go to work, and see and satisfy themselves that such places were safe, before beginning their work, and they were frequently cautioned and warned as to this duty, and that they must never, under any circumstances, work under overhanging ground without first examining it, and being satisfied that it was all right, and, if found dangerous, to make or have it made safe; and they were allowed to take all the time and have all the assistance necessary for that purpose, and they understood and knew that no one would go ahead of them for that purpose, but that that was one of their particular duties." 114 Mich., at page 382 (72 N. W. 245).

From the minority opinion, Mr. Justice GRANT speaking, we quote:

"The situation, in brief, is this: These men were authorized and were expected to judge for themselves as to the safety of the place. They were competent to do so. They had been cautioned against working in dangerous places. They placed no reliance upon the judgment of any other employee, officer, or man, but used their own judgment. They were at liberty to withdraw if they considered the place dangerous. * * * The master in this case had furnished the proper tools and appliances, competent and experienced men, and had instructed them to exercise their own judgment as to the safety of the place, and had authorized them, if in their judgment the place was unsafe, not to go to work, but to take the necessary steps to render the place safe." 114 Mich., at pages 383, 384 (72 N. W. 245).

The sole ground of negligence relied upon in plaintiff's declaration is that it did not perform its duty

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in furnishing a safe place for the plaintiff's decedent to perform his work.

The first question which arises is whether the doctrine of a safe place, as invoked, is applicable to this case. Under the undisputed evidence in this case, as far as performing his work was concerned, plaintiff's decedent was engaged in making a safe place, and it is self-evident that it would be an impossibility for the defendant to cause the timbering in this stope to be done in advance for the protection of the men who themselves were specially employed to put in the timbering. The dangers were only those necessarily incident to the employment, changing from hour to hour, as the work progressed, and it is apparent that, by reason of the character of the work and the dangers attending it, miners of extraordinary skill and experience were selected, invested with power and authority to determine for themselves the safety of the place before going to work. This court has held that under circumstances of this character the doctrine of safe place does not apply. *Petaja* v. *Mining Co.*, 106 Mich. 463 (64 N. W. 335, 66 N. W. 951, 32 L. R. A. 435, 58 Am. St. Rep. 505).

The undisputed testimony of all the witnesses would indicate that for several hours, in the presence of the hitch cutters, these experienced miners and timbermen worked upon this hanging wall with bars, testing and prying down, until everybody was satisfied that the place was safe, including plaintiff's decedent, who, with his partner, was chief in authority at that work. In the absence of the testimony of the mining superintendent and captain, upon which the opinion of a majority of this court indicated that there was slight evidence of negligence on the part of defendant, it is not necessary to discuss that feature of the case. We are satisfied that there was no evidence in the case of negligence on the part of defendant,

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and the court was in error in refusing defendant's motion for an instructed verdict. This conclusion makes it unnecessary to consider the question of assumption of risk by plaintiff's decedent, or any of the other questions which have been presented by appellant, and are discussed in the briefs.

The judgment of the circuit court is therefore reversed, and, it being obvious that no other or different case can be presented, no new trial will be granted.

BROOKE, KUHN, STONE, BIRD, and STEERE, JJ., concurred. OSTRANDER and MOORE, JJ., did not sit.

TOLSMA v. TOLSMA.

1. PARTITION—COMMISSIONERS—REPORT.

Where three commissioners in partition proceedings met and divided the premises in two portions, directing the parties to whom they allotted the more valuable parcel to pay to the others the sum of $11,000, and the latter objected, claiming that there was a greater difference in value and offering to pay $14,000 which they filed a bond to pay if they might be awarded the more valuable parcel, and where the court referred the proceedings back for further action and it appeared that only two of the three commissioners met and passed on the second report, the other dissenting from the finding of the majority and filing a separate report, the determination of the commissioners should have been set aside because their action was not in conformity with 3 Comp. Laws, § 11040 (5 How. Stat. [2d Ed.] § 13237), requiring the commissioners to act jointly; it was also improper, under the holdings of this court, to proceed without giving the persons interested an opportunity to be heard in the second proceeding.

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2. SAME—NOTICE—HEARING.

Notice of the proceedings of commissioners in partition, to the interested parties, is required: and an opportunity to be present and be heard should be given.

Appeal from Wayne; Codd, J. Submitted November 25, 1913. (Docket No. 90.) Decided March 28, 1914. Rehearing denied June 4, 1914.

Partition by Alex. S. Tolsma and others against Charles S. Tolsma and another. From a decree of partition, defendants appeal. Reversed.

McNamara & Scallen, for complainants.

Arthur E. Schreiter and *Jasper C. Gates*, for defendants.

MCALVAY, C. J. This is an appeal from a decree of the circuit court of the county of Wayne, in chancery, in case of a bill filed for the partition of lands, under the statute. The parties to this cause are the surviving children in interest of Seborn F. Tolsma, who, after the death of his wife, by proper warranty deed, conveyed the premises in question to all of his children jointly, reserving to himself a life interest therein. From and after his death they have continued to own such premises as tenants in common.

Before the institution of this partition suit defendant Charles S. Tolsma acquired the undivided interests of two of the heirs, by which means he became the owner in fee of an undivided three-eighths, and each of the other parties to this suit is the owner of an undivided one-eighth. These premises are described as follows:

"Lot No. 5; and the southerly 49 feet of Lot No. 57, all in section 8 of the Governor's and Judge's Plan of the city of Detroit."

In the proceeding to partition the premises lot No.

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5 is called parcel 1, and the southerly 49 feet of lot 57 is called parcel 2.

The bill was filed by four of the heirs against the remaining two who are interested in these premises. Defendants answered the bill of complaint, and after issue joined a consent decree of partition was made and entered October 21, 1912. By this decree David T. Lorimer, William A. Gleason, and William T. Dust were appointed commissioners in partition, and afterwards qualified and proceeded to perform their duties as such commissioners. Having concluded their work in the premises, all of these commissioners, on March 21, 1913, made and filed their report in said court and cause containing a statement of their acts and doings, which report, omitting the formal parts, reads as follows:

"To the Circuit Court for the County of Wayne, in Chancery:

"In pursuance of a decree for partition entered October 2, A. D. 1912, and a supplemental decree made and entered on the 4th day of February, A. D. 1913, appointing the undersigned as commissioners in partition, in the above-entitled cause, we, the commissioners named in the said decrees, respectfully report unto the court:

"That after we and each of us had taken and subscribed an oath, honestly and impartially to execute the trust reposed in us, and make partition and division as directed by the court, which said oath is hereto annexed for greater certainty and filed herewith, we went together upon the premises described in said decree, to wit, lot number five (5), and the southerly forty-nine (49) feet of lot number fifty-seven (57), all in section eight (8), of the Governor's and Judge's Plan of the city of Detroit, Wayne County, Michigan, and after careful inspection, and on consideration, made a partition thereof, quality and quantity relatively considered, according to their respective rights and interests as declared by the said court in and by said decree; that is to say, after giving notice in writ-

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ing, by registered letter, to all the parties interested, and their respective solicitors, of the time and place of our meeting held to consider the matters referred to us in said decree, as will appear by proof of service hereto attached.

"We further report that we divided said property into two parcels, parcel 1 being described as lot number 5, in section 8 of the Governor's and Judge's Plan of the city of Detroit, Wayne county, Michigan, and parcel 2 being described as the southerly 49 feet of lot number fifty-seven (57), section 8, of the Governor's and Judge's Plan of the city of Detroit, Wayne county, Michigan. And we further report that we appraised the value of said parcels and buildings thereon, and found a difference in value of $22,000.

"We further report that we set off and allotted to the above-named Charles S. Tolsma and Anna (Tolsma) Shields, in severalty for their interest and share in the said premises, the one-half (½) part thereof according to the relative value thereof, the following parcel thereof, to wit: Parcel one (1), lot numbered (5) in section eight (8), of the Governor's and Judge's Plan of the city of Detroit, Wayne county, Michigan. And we set off and allotted to the above-named Alex S. Tolsma, Ray S. Tolsma, Gertrude L. Tolsma, and Venus E. Tolsma, in severalty for their interest and share in said premises, the one-half (½) part thereof according to the relative value thereof, the following parcel of land in the following proportion: Parcel two (2), the southerly forty-nine (49) feet of lot numbered fifty-seven (57), section eight (8) of the Governor's and Judge's Plan of the city of Detroit, county of Wayne, and State of Michigan. To Charles S. Tolsma three-quarters (¾) and to Anna Tolsma Shields one-quarter (¼) of parcel one (1). And we do further report that parcel two (2) is of greater value than parcel one (1) (and that, for the purpose of equalizing the division of said premises, the said Alex S. Tolsma, Ray S. Tolsma, Gertrude L. Tolsma, and Venus E. Tolsma, who are allotted said parcel two [2], are hereby directed to pay, and the said parcel two [2] is charged with the payment of, the sum of eleven thousand dollars to the persons receiving parcel one [1], as named herein).

"And we further certify and report that the items

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of the various expenses attending the execution and our said duties as commissioners in partition, including our fees as commissioners, are contained in a schedule hereto annexed and marked Exhibit A, and forming a part of this our report.

"All of which is submitted for the approval of the court.

"In witness whereof we, the said commissioners, have set our hands and seals to this our report this 18th day of March, A. D. 1913.

"DAVID T. LORIMER. [L. S.]
"WM. A. GLEASON. [L. S.]
"WM. T. DUST. [L. S.]."

Afterwards the attorneys for complainants filed and served upon defendants notice of a motion for confirmation of this report in partition, to be heard May 26, 1913. On April 18, 1913, defendants filed exceptions to this report which, omitting the formal parts, are as follows:

"To the Circuit Court for the County of Wayne, in Chancery:

"Your petitioners, the above-named defendants Charles S. Tolsma and Anna Tolsma Shields, hereby make and file exceptions to the report of the commissioners in partition heretofore filed, in the above-entitled cause, that is to say:

"(1) Because the said commissioners in and by their said report have greatly underestimated the difference in value between 'Parcel 1' and 'Parcel 2,' described in said report.

"(2) Because in truth and in fact said 'Parcel 2' is worth the sum of $28,000 more than said 'Parcel 1,' and that the difference in value of $22,000 as found and reported by said commissioners is grossly inadequate.

"(3) Because your petitioners are ready and willing and hereby offer to pay to the above-named complainants the cash sum of $14,000, making a total difference of $28,000, in value of said 'Parcel 2' over and above the value of said 'Parcel 1,' in case this court shall set aside said report and recommit to the said commissioners the partition and division of the pieces

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or parcels of land described in the bill of complaint filed in this cause and specified in said report.

"(4) Because your petitioners tender herewith a bond in the penal sum of $14,000 with sufficient sureties conditioned to pay to said complainants the sum of $14,000, in case said parcel 2 shall be set off and allotted to your petitioners, in severalty for their interest and share in said premises.

"(5) Because your petitioners will be greatly damaged if said report of said commissioners is confirmed, and will suffer great loss if the same is allowed to stand, and the same will operate as fraud upon your petitioners."

This petition prayed the court to set aside and vacate the report, according to statute, and for an order to recommit the making of such partition to the same or new commissioners, who should proceed therewith according to law, and with such petition, according to its offer, defendants filed a bond in the penal sum of $14,000.

On May 22d, before the time of hearing the motion for confirmation arrived, the court made the following order:

"At a session of said court, convened and held in the circuit court rooms in the city of Detroit, county of Wayne and State of Michigan, on the 22d day of May, A. D. 1913.

"Present, the Honorable George Codd, circuit judge.

"On reading and filing the exceptions of the above-named defendants to the report of David T. Lorimer and William Gleason, two of the commissioners in partition, heretofore filed in the above-entitled cause, and a bond for the sum of fourteen thousand dollars ($14,000) filed with said exceptions, it is ordered that said report be and it is hereby referred back to the commissioners in partition heretofore appointed in said cause for further findings."

By some error the report in this order is called the report of two commissioners. It was in fact the report signed by all of them.

On the same date two of the commissioners made

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out and signed the following report (omitting the entitling):

"We, the undersigned commissioners in partition in suit, *Tolsma* v. *Tolsma*, do hereby reconfirm our report filed and submitted in said cas

"Detroit, Mich., May 22, 1913.

"DAVID T. LORIMER.
"WILLIAM A. GLEASON."

On May 24th following defendants made and filed exceptions to this report of the two commissioners for the same reasons as stated in their first exceptions, objecting to the confirmation of the first report, and praying for the same relief. On the same day complainants, by petition reciting matters as to the first report, and its reference back to the commissioners, and also showing that Commissioner Dust had filed a minority report, asked that the report of the two commissioners be confirmed. A report of Commissioner Dust, favoring the change in the report petitioned by defendants, was filed May 26, 1913. On June 19th following defendants filed a petition duly verified, and asked the court, for the reason that no opportunity had been given them to be heard by the two commissioners after the case had been referred back, and for the reasons given in former exceptions, to set aside the last report of the commissioners, and appoint new commissioners, on account of the partisanship and prejudice of the two commissioners against them.

On June 26, 1913, the court entered a final decree in the case in which was recited the entire first report of the commissioners already given, and recited the fact that the matter was referred back to the commissioners for further consideration, and that a further report made by the two commissioners reaffirming the former report, which decree confirmed the first report of the commissioners, and made partition of the premises accordingly, and decreed de-

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fendants should receive the part partitioned to them and $11,000 from complainants as their portion, according to the terms and conditions of said report.

It is the contention of appellants that this decree should be reversed (*a*) because the proceedings were irregular and void, and (*b*) that the decree is unjust. They contend that the final report of Commissioners Lorimer and Gleason in response to the order of the court made May 22, 1913, made on the same day, was without the presence or co-operation of Commissioner Dust; that they gave appellants no notice of any meeting, and no opportunity to be heard at said meeting to reconsider their report in accordance with the order of the court.

After the commissioners had made their first report, the record shows that defendants filed exceptions thereto by a petition in writing duly verified, asking that the report be set aside and vacated as provided by statute. This petition upon its face showed that parcel 2, which had been assigned to the complainants, exceeded the value of parcel 1, which had been assigned to appellants, by the sum of $28,000, and they filed a surety bond to substantiate their offer that they would give to complainants $14,000 as a fair difference between the values of the parcels.

After hearing these exceptions, the order referring the report back to these commissioners was made "for further findings." Without any notice to appellants, or any opportunity to be heard on their part before the commissioners, and, as far as the record shows, in the absence of Commissioner Dust, the majority commissioners, on the same day the order of court was made for further findings, returned as follows:

"We, the undersigned commissioners in partition in suit, *Tolsma* v. *Tolsma*, do hereby reconfirm our report filed and submitted in said case.

"Detroit, Mich., May 22, 1913."

The individual report of Commissioner Dust, made

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after this second report, accepts the proposition of defendants, and reports that $14,000 should be paid by the defendants, quality and quantity relatively considered. This has a bearing upon the contentions of defendants, at least by inference, that this commissioner was not present at the meeting of the 22d of May, when the second report was made by the majority, and also as bearing upon question of the injustice of the decree.

Proceedings in partition of lands are statutory, and, among other requirements, appear the following:

"The commissioners shall make an ample report of their proceedings, under the hands of any two of them, specifying therein the manner of executing their trust, and describing the land divided and the shares allotted to each party, with convenient certainty. * * *" Section 11039, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 13236).

The first report made by the three commissioners March 18, 1913, already set forth in this opinion, is an indication that the commissioners had knowledge of and followed the reasonable requirements of this section. In that report it is recited, among other things:

"That is to say, after giving notice in writing, by registered letter, to all parties interested, and their respective solicitors, of the time and place of our meeting held to consider the matters referred to us in said decree, as will appear by proof of service hereto attached. * * *"

And in another portion of said report is stated that, after each of them had taken an oath honestly and impartially to execute the trust, "we went together upon the premises," etc.

There is another statutory provision relative to the participation of commissioners in the proceedings, as follows:

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"All the commissioners must meet together in the performance of any of their duties. * * *" Section 11040, 3 Comp. Laws.

It is apparent that neither of the requirements of the two sections quoted were complied with. The court had made an order for a rehearing because of certain facts which had been presented as to the value of one parcel of the lands to be partitioned, and on petition of defendants had granted the privilege to be heard, as provided by statute, section 11042, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 13239), which provides the commissioners "shall proceed in like manner as hereinbefore." The majority of the commissioners denied this privilege. Upon both branches of this contention as to the right to be heard, and as to the necessity of the presence of all the commissioners at all meetings, this court has sustained the claim of appellants. In an early case, this court said:

"The defendants had a right to be present and to be heard when these things were done; and notice of the meetings of the commissioners should have been given to them, that they, or either of them, might have been present if they desired. The requirement of such notice is always implied, when not expressed in the statute, and indispensable.

"The commissioners failed, also, to comply with the plain language of the statute, in attempting to take action under the order without all being present. It is not necessary that all should sign or acknowledge the report, but their deliberations should be had together, and they must all meet when the final action is taken and * * * signed. One of the commissioners, who appears to have been willing to act, and had not been discharged or disqualified from acting, took but little or no part in the deliberations of the commissioners, and was not present at, nor had notice of, their last meeting, and had no notice or knowledge whatever of the final action taken by the other two. This was a clear violation of the statute. It is of no consequence now to say that Dewey would not have agreed to the report filed had he been present, or

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participated in the deliberations with the other two. It is quite possible it ought not to have been agreed to, and it may not be improbable that a different result might have been reached had they then sufficiently consulted together. However this may be, it cannot change the requirement of the statute with which, in both of the instances pointed out, the commissioners failed to comply." *Simpson* v. *Simpson*, 59 Mich. 71, 77 (26 N. W. 285).

The next contention is that the decree is inequitable, and ought to be reversed, for the reason that parcel 2 is worth $28,000 more than parcel 1, and the decree for equality of partition awards only $11,000, instead of $14,000.

When the matter was referred back for further findings upon the sworn petition and offer of defendants, it is manifest that it was done for the purpose, not only of giving opportunity to defendants to present proofs and be heard, but also to correct an injustice. If the facts set up in the petition are true, an opportunity should have been given to correct any error which had been committed in that regard. Defendants had a right to question the correctness of the conclusions of the commissioners as to values, and apparently the proposition made by them is not unusual. Under the circumstances their sincerity cannot be questioned; their conduct in filing a bond was an assurance of that. A very similar case is reported from New Hampshire where the action of the commissioners was set aside. *Timon* v. *Moren*, 54 N. H. 441.

There are two other matters which are called to our attention by defendants' brief. The first is the claim that the award of parcel 2 to complainants upon paying defendants $11,000 was unauthorized and void, for the reason that section 11094, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 13291), expressly confers such judicial power upon the court; and also that the com-

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missioners did not follow the decree and value each parcel separately.

We do not think it necessary to express any opinion upon these propositions at the present time. As the case will be remanded for further proceedings, these matters will receive all necessary attention.

The decree appealed from is reversed and set aside, and the cause remanded to the circuit court for the purpose of the appointment of new commissioners to make partition of the premises, according to the equities of the respective parties, and the statute in such case made and provided. Defendants will recover costs of both courts.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

TOWNSHIP OF FOREST *v.* AMERICAN BONDING CO. OF BALTIMORE.

1. LIMITATION OF ACTIONS—PLEADING—DEMURRER.
   The statute of limitations as a defense must be pleaded; the objection cannot be raised by a demurrer to the declaration in an action at law.

2. PLEADING—PRINCIPAL AND SURETY—STATUTES OF LIMITATION—BONDS.
   The defense that an action on a surety bond for default of the treasurer of a township is barred by limitation of time fixed by the contract, cannot be presented by demurrer to the declaration.

Certiorari to Cheboygan; Shepherd, J. Submitted November 25, 1913. (Docket No. 56.) Decided March 28, 1914.

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Assumpsit by the township of Forest against the American Bonding Company of Baltimore and Harry L. Sias on a surety bond. From an order overruling a demurrer to plaintiff's declaration, defendant bonding company brings certiorari. Affirmed.

I. S. Canfield (Keena, Lightner, Oxtoby & Oxtoby, of counsel), for appellant bonding company.

C. S. Reilley, for appellee.

MCALVAY, C. J. Plaintiff brought suit against Harry L. Sias, formerly township treasurer of plaintiff township, and American Bonding Company of Baltimore, as defendants, upon a surety bond given to plaintiff by them as principal and surety as the official bond of such township treasurer. Defendant bonding company demurred to the first count of plaintiff's declaration. This demurrer was overruled, and the case is brought to this court for review, under Act No. 310, Pub. Acts 1905 (5 How. Stat. [2d Ed.] §§ 13737-8), upon a writ of certiorari by the demurring defendant.

The record consists of the pleadings and the return of the trial judge to the writ. The facts are not in dispute and, stated briefly, are as follows: Defendant Sias was elected treasurer of plaintiff township in April, 1907, and furnished a bond in the penal sum of $6,000, upon which the American Bonding Company became surety. It is claimed that Sias was short in his accounts with the township at the end of his term of office in April, 1908, $1,589.74. One Julius Gross was elected to succeed Sias in office in April, 1908, and held the office of treasurer of plaintiff township for two successive terms and until April 4, 1910, when Sias was again elected to the office of treasurer.

It is claimed by plaintiff in its declaration that Sias represented to the township upon his re-election in April, 1910, that Gross was in default as treasurer

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in the sum of $1,693.30. October 11, 1910, said Forest township sued Gross and his surety upon his official bond, as treasurer, in the circuit court for the county of Cheboygan, which suit was tried in said court in March, 1911, resulting in a verdict for plaintiff against said Gross, of $103.56. Judgment upon the verdict in said suit was entered March 2, 1911. And it is claimed that at this trial the township for the first time knew that Sias was in default in the sum of $1,589.74, and this present suit was commenced by summons May 15, 1912.

The declaration in this case consists of a special count upon the bond given by Sias on April 27, 1907, for the ensuing year, and the bond is set up in full. To the special count in the declaration are added the common counts in assumpsit. The bond in form is a bond given by Harry L. Sias as principal and the American Bonding Company as surety, running to the township of Forest, Cheboygan county, Mich., and the employee mentioned in the bond was that of township treasurer of the township of Forest, conditioned to stand for his defaults in said office for a term of one year, as therein mentioned. It is alleged in the declaration, as shown by the return of the circuit judge, that the cause of action against Sias and petitioner had been concealed from said township, its officers and agents, and that due notice had been given by said township, its officers and agents, as soon as they became aware of the shortage, and that suit was commenced within one year thereafter.

The bond upon which plaintiff declared was not in form the bond required by the statute to be given by township treasurers, but is in form such a bond as is furnished by surety companies for an employee to his employer; these terms being used therein in reference to Sias, the treasurer, and the township of Forest. It was made and executed by the principal and surety

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and was delivered by them, accepted and approved by the township board and by the supervisor of the township for its use and benefit, as and for the official bond of defendant Sias, as township treasurer, required by law. The material portions of this bond are as follows:

"Know all men by these presents: That Harry L. Sias, of Tower, Mich., the employee, as principal, and the American Bonding Company of Baltimore, hereinafter called the surety, as surety, are held and firmly bound unto township of Forest, Cheboygan county, Michigan, the employer, in the sum of six thousand ($6,000) dollars, to the payment whereof we bind ourselves, our heirs, legal representatives, successors and assigns.

"Signed and sealed, this twenty-seventh day of April, 1907.

"The condition of this obligation is: That the employee shall in the position of township treasurer. and in no other in the employer's service, make good to the employer, within sixty days, any loss sustained by the employer by larceny or embezzlement committed by the employee during a term commencing on the 22d day of April, 1907, at 12 o'clock noon, and ending upon the 22d day of April, 1908, at 12 o'clock noon."

This bond recites that it "is made, issued and accepted, or renewed, upon the following conditions." There are eight of these conditions, of which those material only are given, as follows:

"(3) That the surety's liability hereunder shall cease immediately as to subsequent acts of the employee from and after: (*a*) Discovery by the employer, his or its officers, of any default on the part of the employee."

The fourth condition provides that the employer shall immediately give notice to the surety, at its expense, by telegraph and registered letter, of the discovery of any default on the part of the employee, with full particulars.

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"(5) That the employer's claim for default hereunder must be presented to the surety within six months from the date the responsibility of the surety for the employee's further acts ceased from any cause, and no suit or proceeding at law or in equity shall be brought after 365 days shall have passed from the date upon which the surety's responsibility for the further acts of the employee ceased."

The foregoing are the conditions relied upon by the defendant American Bonding Company in its demurrer to the special count. The reason urged before the circuit court for sustaining defendant's demurrer was that plaintiff's action was begun too late, which is expressed in the demurrer as follows:

"(3) Because said suit was commenced more than 365 days after the date when this defendant's responsibility as surety upon the further acts of said defendant Harry L. Sias had ceased."

"(5) Because the cause of action mentioned in the first count of said plaintiff's declaration, if any there be, did not, nor did any or either of them, accrue to the said plaintiff at any time within 365 days before the commencement of this suit."

Counsel for appellant, in its brief, first discusses the question whether the defense that the plaintiff's claim is barred by the limitations in the contract can be raised by demurrer, and seeks to distinguish the instant case from *Renackowsky* v. *Water Commissioners*, 122 Mich. 613 (81 N. W. 581), and *First Nat. Bank* v. *Steel*, 136 Mich. 588 (99 N. W. 786), by stating that in these cases such defense is not plainly evidenced by the declaration itself, while in the instant case the limitation of the action is provided in the contract.

The question is no longer an open one in this State. On both of the cases cited, which appellant seeks to distinguish from the instant case, it was held distinctly by this court:

"The general rule is that the statute of limitations

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must be pleaded, and that the defense cannot be raised by demurrer." *Renackowsky* v. *Water Commissioners*, 122 Mich., at page 615 (81 N. W. 582).

See, also, *Whitworth* v. *Pelton*, 81 Mich. 98 (45 N. W. 500); *Shank* v. *Woodworth*, 111 Mich. 642 (70 N. W. 140). And later:

"Another ground of demurrer insisted upon is that plaintiff's cause of action was barred by the statute of limitations. This objection cannot be made by demurrer. (Citing above case [*First Nat. Bank* v. *Steel*].")

This appears to be the established doctrine in all but the Code States.

"In actions at law, as contradistinguished from actions under the Code, it has always been the established rule that if the defendant desires to avail himself of the statute of limitations as a bar to the demand in suit, he must plead the defense." 13 Enc. Pl. & Prac. p. 200.

It is therefore unnecessary to pass upon any of the other important questions presented by the briefs and which were apparently considered in the court below.

The judgment of the circuit court is affirmed, and the case will be remanded, and defendant permitted to plead within the usual time provided by rule.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

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McLAULIN *v.* WAYNE CIRCUIT JUDGE.

1. EXECUTORS AND ADMINISTRATORS — SPECIAL ADMINISTRATOR — ACTIONS—REVIVAL.

   A special administrator of the estate of a decedent can neither maintain actions to recover the possession of lands nor defend suits brought to divest the estate of title.

2. ABATEMENT AND REVIVAL—ESTATES OF DECEDENTS—EQUITY.

   Accordingly it is not erroneous to refuse to revive a suit in the name of a special administrator brought during the lifetime of the deceased to recover certain real property claimed by the deceased, and mandamus will not lie to require the circuit court to enforce such revival under 1 Comp. Laws, § 471 (4 How. Stat. [2d Ed.] § 11989).

Mandamus by Serena McLaulin against Henry A. Mandell, one of the circuit judges of Wayne county, to compel respondent to enter an order setting aside an order vacating the revival of a suit brought by relator against the decedent in his lifetime. Submitted January 6, 1914. (Calendar No. 25,774.) Writ denied March 28, 1914.

Daniel M. McLaughlin, William H. Wetherbee, and *Jasper C. Gates,* for relator.

H. E. Spalding, for respondent.

BROOKE, J. In August, 1912, relator filed her bill of complaint in the Wayne circuit court against one John D. McLaulin, her husband, and others. In this action she seeks to regain the title to certain real estate in Wayne county, a portion of which (at the time the bill was filed) was apparently owned by defendant John D. McLaulin. John D. McLaulin, being a resident of the city of Toronto, Canada, could not be personally served with process. After due publication of an order of appearance, however, and on

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December 18, 1912, he appeared and caused an answer to be filed to complainant's bill of complaint. Eight days later (December 26, 1912) he died in said city of Toronto, leaving a last will, by the terms of which he bequeathed his entire estate to the Toronto Bible College of the city of Toronto. Relator is contesting the probate of the will. On February 25, 1913, relator petitioned for and secured the appointment of one of her sons (David McLaulin) as special administrator of the estate of her deceased husband, John D. McLaulin, and he (David) duly qualified as such special administrator in the probate court for Wayne county. On March 8, 1913, upon the application of relator, said chancery cause was by order of the Wayne circuit court in chancery revived against said David McLaulin, as special administrator of the estate of John D. McLaulin. On June 7, 1913, upon motion of Messrs. Walker & Spalding, acting as solicitors for the other defendants, respondent set aside the order of revivor of March 8, 1913. Respondent refused, upon application of relator, to set aside the last order, whereupon relator applied to this court for a writ of mandamus to compel such action.

Relator's application is based upon the provisions of 1 Comp. Laws, § 471 (4 How. Stat. [2d Ed.] § 11989):

"No bill of revivor, or supplemental bill in the nature of a bill of revivor, shall be necessary to revive a suit against the representatives of a deceased defendant, or other person or persons interested in the subject of such suit; but the court may, by order, direct the same to stand revived upon the petition of the complainant."

It is contended on behalf of respondent that the special administrator has no interest in the real estate of John D. McLaulin, and has therefore no authority to defend a suit involving the title to such real estate.

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Section 9327, as amended by Act No. 241, Public Acts of 1905 (4 How. Stat. [2d Ed.] § 11043), provides:

"An administrator appointed according to the provisions of the preceding section shall collect all the goods, chattels and debts of the deceased, and preserve the same for the executor or administrator who may afterwards be appointed, and for that purpose may commence and maintain actions as an administrator, and may sell such perishable and other personal estate as the probate court may order to be sold. All personal actions, the cause of which does by law survive and which may be pending either for or against the intestate of such special administrator, may be proceeded with and be prosecuted by or against such special administrator, and the same proceedings taken as are provided by law relating to such actions in cases where an executor or general administrator has been appointed."

In a recent case (*Union Trust Co.* v. *Kirchberg*, 174 Mich. 161 [140 N. W. 464], we held, following the decision in *Pratt* v. *Millard*, 154 Mich. 112 (117 N. W. 552), that a special administrator, by reason of the limited character of his statutory powers, could not maintain a suit to recover possession of lands. In this case, as in that, the rights of creditors are not involved. The real estate of McLaulin upon his death, therefore, passed either to his heirs or his devisee, and in neither event has his special administrator any interest therein. If a special administrator may not maintain a suit to regain possession of real estate because of lack of interest therein, it would seem to follow, as a necessary corollary, that he is not clothed with power to defend such a suit.

The writ is denied.

MCALVAY, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

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CADIEUX v. CADIEUX.

1. DIVORCE—EXTREME CRUELTY—CONDONATION.
   Evidence of a conflicting nature in a suit for divorce based on charges of extreme cruelty, *held*, insufficient to justify a decree, and, if credible, the acts charged were condoned by complainant.

2. SAME—GAMBLING—NONSUPPORT.
   Although there was testimony in support of the wife's averments and claim that defendant gambled on horses and bought stocks and failed to provide for her maintenance and comfort as fully as her needs required, the proofs were not sufficient to warrant the court in finding that, being of sufficient ability, defendant grossly or wantonly and cruelly refused and neglected to provide suitable maintenance for his wife.

Appeal from Wayne; Hosmer, J. Submitted January 13, 1914. (Docket No. 68.) Decided March 28, 1914.

Bill by Emlita Cadieux against Henry W. Cadieux for divorce. From a decree for defendant, complainant appeals. Affirmed.

Ralph B. Wilkinson, for complainant.

Devine & Snyder, for defendant.

STEERE, J. This suit was instituted in the circuit court of Wayne county by complainant to obtain from defendant a decree of divorce on the ground of extreme cruelty and failure to support.

The charges in complainant's bill range through the whole period of the married life of the parties, beginning with their wedding trip, and include failure to suitably provide maintenance, irritability, and abusive language, gambling habits, use of drugs, and

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cruelty of a private nature. Defendant's answer denied all complainant's charges positively and in detail, otherwise casting no reflections on her nor making any counter charges, and opposed a severance of their marriage ties on the ground that the allegations against him were untrue in fact, and their married life had been a source of happiness to both, congenial and pleasant, except when occasionally disturbed by outside influences. The testimony indicates that he attributed his wife's application for a divorce to the influence of her parents, rather than to her own inclination.

The parties were married in 1901, in Detroit, Mich., where she resided with her parents, who were apparently in good circumstances, living in their own home, which her father, who was engaged in the lumber business, testifies would rent for $75 per month. Defendant was a physician living and practicing at Grosse Pointe where his parents resided. When married he was 30 and she 21 years of age. She states he represented that he then had a practice yielding from $2,500 to $5,000 per year. He states that it was worth $5,000 per year when they were married, and he located in Detroit at the solicitation of his wife and her parents. This she denies, claiming he was anxious to establish himself in Detroit. They were acquainted for nearly a year and a half before their marriage and he had been entertained at her parents' home. Her affiliations were Protestant, while he was of the Catholic faith. It is not shown that this was directly the cause of any friction between them, but she testified that her mother was opposed to Catholic priests and wanted her to be married by a Protestant minister, to which defendant consented. In the year 1902 one child, a daughter, now living, was born as the issue of this marriage, for whom both manifest strong affection. The parties went on a wedding trip

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immediately after their marriage and visited the Pan-American Exposition at Buffalo. She claims, and he denies, that their trip was to have been extended to New York, but they were obliged to return owing to his being short of funds. The conflict in their testimony begins at this early stage and continues on through the history of their married life. On their return they went to live with her parents, which she states had been previously agreed upon. Most of their married life together was with her parents. She testifies:

"The arrangement was that father should supply the home, which was a new, solid stone ten-room house with hardwood floors and other conveniences and the furnishing of it, and the doctor was to give mother her board and father, who was a traveling man, his board at such times as he was home."

The extent to which defendant kept his part of the agreement is a matter in dispute.

Defendant opened an office and engaged in the practice of his profession. The testimony is clear to the effect that he acquired a good practice and they apparently were prosperous and living happily. They remained at her parents' home until February, 1906, when defendant left for a time; she remaining. In September, 1906, they went to keeping house in apartments on Jefferson avenue, where they resided for two years and four months, near the end of which time her parents boarded with them for quite a period while their house was being repaired, when they all returned together and occupied her parents' house as before. Defendant claims to have objected to giving up their own home, where they had lived so pleasantly and happily by themselves, but that she and her parents insisted, and he yielded. She testified that he complained of the expense of maintaining a separate home and was anxious to return. They there-

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after resided with her parents until shortly before this bill was filed, when she told him that she proposed to get a divorce, and dismissed him. Being asked when it dawned on her that she ought to have a divorce, she replied:

"Well, I can answer you the same as I did Dr. Cadieux. I answered him by saying that it had been a gradual losing of respect covering a period of ten years, and made harder and harder with the passing of each year by his disagreeableness and his low tastes —that he knew best how."

Defendant testified of his dismissal that he knew nothing about any trouble until the morning they separated, when she came to his room and greeted him; on his asking her to kiss him, she refused, saying she would tell him after breakfast; that they breakfasted as usual, and, it being Monday morning, at which time he usually gave her money to run the house, he offered her his share, which was $15, and she said she would receive no more money from him, that her father and mother were going to live in California and she had told them everything about him, that she would not live with a gambler, and they had promised to take her back home and she was going; that his efforts to dissuade her were of no avail, and she soon began this suit.

The testimony of significance in support of complainant's contention, aside from her own, is that of her parents, mostly her mother's, tending to show failure to support his wife and contribute to the maintenance of the establishment to the extent he should and had agreed to, and irritating and unseemly conduct around the home. Complainant's mother, who testified at length of many details in their domestic life, condenses her objections to her son-in-law into "two strong points," being: "No funds and irritability—two pretty hard things to live with." The father, who was from home most of the time, testified

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in harmony with his wife to the extent of his observations and experience, and says the doctor "was all self," admits borrowing $200 of him, which was paid back, and says:

"I liked Dr. Cadieux pretty well. I always tried to get along with him. * * * He used to help me fix the furnace and clean off the sidewalk and things like that. * * * The doctor always got along with Mrs. King (complainant's mother), so far as I know."

The only other members of the household with personal knowledge of their daily, domestic life were Harriet Traut, who was a domestic in the family for a year after complainant and defendant went there, and Jennie S. Keeler, a friend who had known Mr. and Mrs. King 35 years and lived in the family, while complainant and defendant were there, for about six years. Harriet Traut stated she thought the doctor and his wife were—

"The best of friends. Mrs. King treated the doctor very nagging; she was very disagreeable in that way. She would find fault with different things with the doctor, trying to pick at him. She was very disagreeable to get along with anyways."

Mrs. Keeler testifies:

"Well, it is a mystery to me. I was in that home the first five years of the doctor's married life. I was in Mrs. King's home the first five years after the marriage of the doctor and Miss King, and it seems to me that I was either blind or deaf or something. I don't know what it is. And so much has been told here that I know nothing about and it is just as new to me as it is to a stranger; I cannot understand it. * * * I don't understand all these things. There are some things I may have known, but they have gone from me. * * * I have always thought that if the doctor and his wife were left alone they could get along well together."

Witness also testified to complainant visiting her

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and their talking the matter over, in which conversation witness tried to prevail upon complainant to give up the idea of a divorce for the sake of their child, and said, "If you two don't get along well, why don't you separate and live apart for a while, perhaps it will be all right in the end?" To which complainant replied, "No, I want a divorce from that man," she says, "I might some time want to get married again."

Numerous witnesses of respectability, in responsible positions in life, and their wives, who were or had been friends, neighbors, and associates of both parties to this suit, none of whom speak unkindly of complainant, testify to the good character, habits, and professional standing of defendant and the conduct of these parties towards each other in their daily life and at social gatherings, when mingling with their friends and acquaintances. They speak of them as an "ideal couple," apparently fond of each other and happy together. They moved in good society and were frequently out together at social functions and public entertainments. Between November, 1910, and February, 1911, the month this bill was filed, they attended seven dances, or balls, which were leading, high-class, public, social entertainments, going in taxicabs to six of them, and visited otherwise socially amongst their friends as usual, attending a party together at the home of mutual friends about two weeks before this bill was filed.

While it may be conceded that complainant would conceal so far as possible her private family troubles, it is somewhat significant, as bearing on the charge of nonsupport at least, that there was no suspicion amongst their intimate friends of any estrangement. It is undisputed her husband did provide her with money and credit; the only dispute is as to the amount. She testifies, "I had credit at Hudson's, at Newcomb's, at Elliott-Taylor-Wolfenden's, at Traver-Bird's," lead-

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ing merchants of Detroit. Her testimony that defendant was a cocaine fiend is, in our opinion, unsupported and clearly refuted not only by his positive denial, but by all extraneous evidence given by professional men of high standing, his patients, and others. This, with her tendency to magnify comparatively small incidents of their married life, which, if of any importance, had been condoned years before, tends to weaken her uncorroborated testimony as to other more serious charges. As to the charge she makes against defendant of unnatural, secret misconduct, we do not differ with the following conclusion of the learned trial judge:

"If with reference to the other matter of cruelty which is perhaps the highest charge that has been made here, if it were true, I think that Mrs. Cadieux has condoned that by not leaving the doctor at the time; but, as I said before, I am not willing to believe in the truth of that statement."

There is some foundation in the charge that defendant was a gambler. While culpable and an evidence of moral instability, we are not prepared to hold that, as proven, it amounted to a cause of divorce. He was in no sense a professional gambler, nor even a second-class amateur, but is shown to have at times manifested a weakness for attending horse races and investing disastrously in his judgment as to the comparative speed of the competing horses. If his defense depended upon his denials and explanations in that connection, there would be little hope for him. He is also shown to have sought to increase his financial resources by investment in stocks through the brokerage firm of Cameron Currie & Co., which failed disastrously, and he stated at the time that he had lost everything. While this venture is to be deprecated as evidence of a gambling inclination and poor judgment, the courts have not yet gone so far as to hold such conduct ground for divorce. While

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at times shown to have been in debt and with impaired credit, defendant is shown at other times to have deposits in bank as high as $1,600 and to have spent money liberally for their pleasure when traveling with complainant. Though culpable at times in foolishly squandering money which should have been expended for the comfort and pleasure of his family, the evidence taken as a whole falls short of establishing that defendant, being of sufficient ability to provide a suitable maintenance for his wife, grossly or wantonly and cruelly refused or neglected so to do.

No useful purpose can be served in further discussing the extremely conflicting testimony of this lengthy record. We have carefully read it, and, while taken as a whole it leaves the impression that defendant has been a disappointment to complainant and her parents, and has failed to do for his wife, and himself, all that other men under like circumstances would have done, we do not find, under the well-settled rules of preponderance and presumption of evidence, that the grounds of divorce charged in the bill of complaint are satisfactorily established. This conclusion was reached by the learned chancellor who heard the evidence develop and had the benefit of observing the witnesses while they testified, and we find no good reason to disturb the result reached by him.

The decree is affirmed but, under the circumstances, we conclude that it should be without costs to either party.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

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APRIL TERM, 1914.

NUTTER *v.* COLYER.

1. TRIAL—WITNESSES—ABSENCE OF PARTY.

   The action of the trial judge, in charging the jury that defendant's absence from the State during a personal injury case was of no consequence, cured any prejudice that may have resulted from questions referring thereto asked by plaintiff's attorney.

2. SAME—LEADING QUESTIONS—APPEAL AND ERROR.

   Where defendant's counsel took several objections to interrogatories of the opposing attorney, which were not ruled upon by the court, any intention to propound improper questions being disclaimed and counsel offering to frame new questions if the ones asked were objectionable, no prejudice warranting a reversal was made to appear.

3. LANDLORD AND TENANT—CONTRIBUTORY NEGLIGENCE—DEFECT IN PREMISES—PROMISE TO REPAIR.

   A tenant, who relied on the statement of defendant's agent that the floor of the kitchen was safe, was not guilty of contributory negligence, as matter of law, in making use of it, although she had called his attention to its weakness, and he had promised to make the repair, assuring her at the same time that the floor was not dangerously weak.[1]

Error to Wayne; Tucker, J., presiding. Submitted June 9, 1913. (Docket No. 48.) Decided April 7, 1914.

[1] On the question of the contributory negligence of tenant injured by defect in premises, see notes in 34 L. R. A. 830 and 34 L. R. A. (N. S.) 808.

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Case by Georgia A. Nutter against Susan G. Colyer for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

James H. Pound, for appellant.

Bumps & Bishop, for appellee.

MCALVAY, C. J. Plaintiff recovered a judgment in a suit for damages against defendant for injury caused to her leg by the breaking of the floor of the kitchen in the house rented by her from defendant, its owner, claiming that such injury was caused by the negligence of defendant.

There is no dispute but that defendant was the owner of this house; that her husband was her agent and rented the premises in September, 1908, to plaintiff, by the month, for a certain rental; that she resided in the house for nearly two years before the injury occurred, keeping from two to four boarders and eight or nine roomers, and claims that on June 16, 1910, the kitchen floor in front of the stove broke through by her stepping thereon, and one of her legs went through to the knee joint, causing her severe injury, and to extricate her it was necessary to saw out pieces of the boards. Her claim is that defendant, by her husband, who acted as her agent in renting the premises, and who was a carpenter, agreed at the time the premises were rented to her to make all necessary repairs; that in September, 1909, she called his attention to the weakness of the boards in the kitchen floor, on account of the condition of which she was fearful they might break through with her, as she was a heavy person, and asked him to repair them; that he examined the floor and, testing it, said that it would last longer than she would; that he had some boards at his house and would attend to it for her; that she relied upon his statement that it was

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safe and thought no more about the danger; that she continued to walk over the floor afterwards without fear.

There is a sharp dispute between plaintiff and defendant's husband, who acted as defendant's agent, upon the terms of the leasing, which was verbal. He testified that it was agreed when the premises were rented to plaintiff that she would do all required repairs except to the roof and water pipes and pay $25 a month for the house; that no other agreement was ever made between the parties, and that she never called his attention to the weakness of the kitchen floor and never had any talk with him in regard to it; that in August, 1910, she sent for him, saying that she had been injured, when he went back to the kitchen and saw a hole in the floor.

Defendant reviews this case by a writ of error. Of the many errors assigned it will be necessary to consider but few, the most important of which relate to the conduct of the examination of witnesses by plaintiff's attorney and the refusal of the court to pass upon objections of defendant's counsel during such examination, and the refusal of the court to give certain requests to charge, and to the charge of the court.

Errors are assigned upon the conduct of counsel for plaintiff during the examination by him of defendant's agent, who was called under the statute as a witness for plaintiff, and was examined at considerable length as to the absence of the defendant in California during the trial.

The record does not show objections made on that ground and exceptions taken at the time of the examination of the witness. The court, in his charge, told the jury that the absence of the defendant was a matter of no consequence in the case and was not to be considered by them. This corrected any improper impression the jury might have received from the testimony which was not properly in the case.

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The record shows that during the trial of the case, while plaintiff was testifying on her direct examination, counsel for defendant objected several times and took exceptions to certain questions, claimed by him to be leading, upon which objections no rulings were made by the learned trial judge. Upon both of these matters errors have been assigned.

It appears that there were four occasions of this kind while this witness was on the stand. From the colloquies between court and counsel, it appears that during the trial it had been suggested by the court that both attorneys had been interrupting, and that the case was being tried with considerable spirit between counsel. Counsel for plaintiff disclaimed any intention to propound questions which were improper, and also that he had not heard the objections. He offered to reframe the questions if they were objectionable. It is not apparent to this court that these questions were prejudicial, and some of them were of a character which would admit the form of the question, and we cannot say that the allowance of any of them by the court was an abuse of a reasonable discretion. It is probable that the attitude of both counsel in the case by frequent interruptions and the nature of some of the questions objected to justified the court in not ruling on these objections. We find that in the record of 200 odd pages counsel for defendant makes no further complaint because the court did not pass upon his objections. We think that no prejudice to defendant arose by reason of this action of the court.

Defendant, in some of his requests to charge, in substance asked the court to instruct the jury that plaintiff could not recover in this case because of contributory negligence; she having used this floor for a long time after knowledge of its weakness.

It already appears that the terms of the contract

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of renting were in dispute and a question of fact for the jury to determine. Also that plaintiff testified she relied upon an agreement to repair, and claimed that she called the attention of defendant's agent to this defect in the floor, which he specifically promised to repair, and told her the floor was safe, and that she relied upon what he said, and continued to use the floor. This court has held a tenant not guilty of contributory negligence under such circumstances. *Mason* v. *Howes*, 122 Mich. 329 (81 N. W. 111). The court submitted the question to the jury under a proper charge.

We have examined the other errors assigned, and do not find that they require discussion. Our conclusion is that the record does not disclose any reversible error.

The judgment of the circuit court is therefore affirmed.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

BEATTIE v. J. L. HUDSON CO.

1. EVIDENCE—OPINION EVIDENCE—HYPOTHETICAL QUESTIONS.
An expert medical witness' opinion, based on the facts stated in the hypothetical question and in part on a physical examination and in part on statements of the plaintiff and of her attending physician, should have been struck out on the motion of defendant's attorney, in a personal injury case.

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2. SAME — BURDEN OF PROOF — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE—TRIAL—CHARGE.

Defendant's request to charge that the burden of proof rested on plaintiff to show, by a fair preponderance of the evidence, that she had exercised reasonable care and watchfulness to avert if possible a collision, should have been given, in an action for injuries sustained in being run down by a horse, and it was insufficient to state in the charge the rule that plaintiff must exercise reasonable care, etc.

3. SAME—NEGLIGENCE—ANIMALS.

It was misleading, also, to charge that if the plaintiff and her companion were paying no attention to the passage of vehicles on the street, and, while inattentive, walked carelessly in front of defendant's delivery rig then being driven across the street, as shown by a preponderance of the evidence, plaintiff would be guilty of contributory negligence, since the instruction appears to place the burden of proof on the defendant.

Error to Wayne; Van Zile, J. Submitted October 10, 1913. (Docket No. 16.) Decided April 7, 1914.

Case by Lucy M. Beattie against the J. L. Hudson Company for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed.

Sloman & Sloman, for appellant.

Julius J. Thiede and *Frank F. Bumps*, for appellee.

While crossing Grand River avenue at the point of its intersection with Woodward avenue, in the city of Detroit, plaintiff, a pedestrian, came into collision with a horse hitched to one of defendant's delivery wagons, as a result of which she claims to have suffered the injuries for which she brought suit. At the time of the collision, plaintiff, accompanied by a companion, was proceeding in a northerly direction, while defendant's horse was being driven in a westerly direction. The driver of the vehicle had been waiting, upon the easterly side of Woodward avenue, for

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the signal of the traffic officer to permit him to cross. Having received this, he proceeded westerly at a trot. When he reached that portion of Woodward avenue which would have been occupied by the westerly sidewalk if it had been extended across Grand River avenue, the left side or shoulder of his horse and the left thill of his wagon came into contact with plaintiff, who, in crossing, had reached a point just north of the northerly car track on Grand River avenue. Mrs. Davis, a friend of the plaintiff, testified that at the time of the collision she held plaintiff's arm, and that, when plaintiff was struck and thrown backwards, she (Mrs. Davis) prevented her from falling to the pavement. The horse was brought to an immediate stand.

As a result of the collision, plaintiff claims to have suffered a derangement of her genital organs, resulting in a cystic or fibroid condition of the uterus and appendages, which will necessitate the performance of a serious operation, the effect of which, according to the prognosis of some of the physicians, is not very favorable. Much medical evidence was introduced pro and con upon the question as to whether an injury such as plaintiff described could cause the results indicated by her present condition. There was likewise much evidence introduced upon the question of the negligence or lack of negligence on the part of the driver and as to whether plaintiff was or was not guilty of contributory negligence. The accident happened November 20, 1909, and the trial in the court below occurred in October, 1911.

Plaintiff recovered a judgment for $6,000, which is reviewed in this court by writ of error.

BROOKE, J. *(after stating the facts).* Of the 70 assignments of error, the first 34 deal with the admission or exclusion of testimony. We believe they

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are without merit as constituting reversible error with one exception. Dr. Sanderson, an expert witness for plaintiff, in answer to a hypothetical question, gave evidence to the effect that in his opinion plaintiff's present condition was the result of the injury received by her in the accident. Upon cross-examination it developed that the opinion of the witness was based in part upon the facts stated in the hypothetical question, in part upon a physical examination, in part upon the history of the case as related to him by plaintiff, and in part upon what Dr. Oppermann, plaintiff's attending physician, had told him in a consultation. A motion was thereupon made to strike out Dr. Sanderson's testimony, which was denied. We think it obvious that an opinion based upon facts or information beyond the personal knowledge of the witness, and not in evidence, should not have been permitted to stand. *Connell* v. *McNett,* 109 Mich. 329 (67 N. W. 344); *La Londe* v. *Traction Co.,* 145 Mich. 77 (108 N. W. 365). It may be that the opinion of the witness, based solely upon his personal knowledge or observation and the facts in evidence, would have been the same, but of this we cannot be sure. It would seem clear that his evidence upon this point (strongly contested on the part of the defendant) was largely influential upon and may have controlled the verdict of the jury, which clearly indicates a belief in the theory which received his support.

By its second, eighth, and thirty-first requests to charge, defendant asked the court to instruct the jury as to the burden of proof. The eighth is in part as follows:

"The burden is upon her to satisfy you, by a fair preponderance of evidence, that she was not guilty of contributory negligence, and on this particular time and occasion she was exercising reasonable care and watchfulness to avoid and avert, if possible, a collision or accident."

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Upon this point the court charged:

"Now it is incumbent upon the plaintiff in this case, as in cases generally, to make out her case by a preponderance of the evidence; to make out her case by the truths that will convince you; to make out her case, to repeat, by a preponderance of evidence. That is to say, she must prove, gentlemen, to your satisfaction, each and every requisite to a recovery by her, and in this connection I wish to say to you that proof of an injury alone will not support her case. There must appear to be by the proofs adduced a concurrence of injury and wrong. That is, it must appear, not only that the plaintiff suffered injury from the acts of the defendant, but that the acts complained of, which resulted in the injury, were done in a manner and at a time, or under circumstances, which render it wrongful or lacking in due regard for the rights of others. Then, in order to recover in this case, plaintiff must make out a case, not only of injury, but of wrong upon the part of the defendant, or the servant acting in the line of his duty. And so it is that the burden of proving by a preponderance of proof rests upon the plaintiff, both of the wrongful act of the defendant, the injury which resulted therefrom to the plaintiff, and the damages she suffered because of that injury. This is all upon the plaintiff to prove. These essentials must be shown by a preponderance of proof."

In another portion of the charge the jury is instructed that the plaintiff—

"In avoiding the danger, must exercise the same care; that is, the care and diligence that an ordinary person under just such circumstances would exercise in avoiding a collision with a wagon driven as this was driven across the street."

This was a correct statement of the law as bearing upon plaintiff's duty, but we have been unable to discover, anywhere in the charge, an instruction that the burden of proof rested upon plaintiff to show, by a fair preponderance of the evidence, that she had performed that duty. The case was a very close and hotly

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contested one upon the question of plaintiff's contributory negligence. We are of opinion that it was reversible error for the court to refuse to at least give the substance of that portion of the eighth request above quoted.

Again the court charged:

"And, should you find that the claim of the witness Mrs. Davis is true, that she and the plaintiff were on the crossing, paying no attention to the passage of vehicles on the street, and while thus inattentive to the situation the plaintiff carelessly walked in front of the horse of the defendant, being at the time reasonably and with care driven across the street, if you find such facts as this to exist in the case, as proven by a preponderance of the proof, in such case the plaintiff would be guilty of contributory negligence and would not recover in this case. It would be in violation of the rule that I have already laid down that it is incumbent upon her to exercise reasonable care and caution in avoiding any accident or danger from passing vehicles."

This instruction would seem to place upon defendant the burden of showing plaintiff's contributory negligence, which is just the converse of the true rule.

Many other errors are assigned upon the refusal to charge as requested and to the charge as given. We are of opinion that they require no discussion.

For the errors pointed out, the judgment is reversed, and a new trial ordered.

McALVAY, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

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LECUS *v.* TURNS.

1. CANCELLATION OF INSTRUMENTS—FRAUD—EQUITY.
   A bill to set aside a deed of real property, on the ground of fraud and duress and of mental incompetency on the part of the grantor, deceased, presents a case for equitable cognizance, notwithstanding that complainants in their bill prayed to have the conveyance canceled as a cloud on their title, or that defendants were in possession.
2. SAME—DISMISSAL.
   Evidence examined, and *held*, that, complainants having failed to establish any fraud on the part of defendants, the bill was properly dismissed.

Appeal from Muskegon; Sullivan, J. Submitted October 7, 1913. (Docket No. 6.) Decided April 7, 1914.

Bill by Martha Lecus and others against John Turns, Jr., and Jennie Turns for cancellation of a deed of John S. Turns, deceased. From a decree for defendants, complainants appeal. Affirmed.

Turner & Turner, for complainants.

F. E. Wetmore, for defendants.

MCALVAY, C. J. Complainants, heirs at law of John S. Turns, Sr., deceased, filed their bill of complaint in this cause against defendants to remove a cloud from the title to certain land in Muskegon county, averring in said bill that their ancestor, John S. Turns, Sr., being the owner in fee of the land therein described, on August 1, 1896, conveyed the same to defendant John S. Turns, Jr.; that the grantor in said deed was at the time mentally incompetent to make such conveyance, and that the same was procured by fraud and duress; that on November 1, 1906, John S. Turns, Jr., by quitclaim deed, transferred the

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said premises to his wife, defendant Jennie Turns; that both of these deeds were duly recorded. The bill prays that the deeds be declared void and set aside as a cloud upon the title of complainants, and further prays for general relief.

Defendants answered, claiming the benefit of a demurrer, admitting that the conveyances were made, but denying the allegations of fraud, etc., set forth in the bill, averring that the first transfer was made in good faith for a valuable consideration, in fulfillment of an agreement entered into between the parties in 1890, whereby, in consideration that defendants made a home for the grantor during his lifetime, he agreed to give them the lands described in the deed, and under such agreement they went into possession at once, and have so continued in possession without interruption until the present time; that at the time John S. Turns, Sr., gave the deed above mentioned defendant gave back to him a life lease of the premises, and agreed to support him during his natural life; that afterwards, in 1904, for the sum of $1,000 cash, paid to said John S. Turns, Sr., they purchased all his right in said premises under said life lease and contract. Defendant John S. Turns, Jr., disclaimed any interest in the premises, having deeded all such interest to his wife. Upon an issue joined a hearing was had upon proofs taken in open court. Later a decree was granted, dismissing the bill of complaint. Complainants have appealed from this decree to this court.

The record shows that from the time of the conveyance by the ancestor to them, the defendant John S. Turns, Jr., and his wife, Jennie Turns, up to the time of the transfer to Jennie Turns, these premises in question continued in the open, notorious, and exclusive possession of the defendants, and from that time up to the time of the hearing were so possessed

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and occupied by said Jennie Turns. The record also shows that upon the hearing both sides introduced all the evidence they desired upon the merits of the case, and that the court decided the case upon its merits and dismissed the bill.

The contention of the defendants was in the court below, and is in this court, that a bill to quiet title cannot be maintained by one out of possession against a defendant in possession. This is answered on the part of appellants by saying that this is not a bill to quiet title, but a bill to set aside a certain deed fraudulently obtained by defendants.

In a recent case this exact question was presented, and this court held that a bill of complaint, containing averments similar to those contained in the bill in this case, was not a bill to quiet title, but to procure the cancellation of an alleged deed upon the ground that it was obtained by fraud, and therefore presented a case for equitable cognizance. *Gragg* v. *Maynard*, 164 Mich. 535 (129 N. W. 723), and cases cited.

In the instant case the averment in this bill is that the deed sought to be set aside and declared void was obtained by fraud and undue influence, and, as in the case above cited, also averred that the deed was a cloud upon complainants' title, and prayed to have such cloud removed. The contention of defendants, therefore, cannot be sustained.

We have examined all of the evidence presented in the case to the court. It will be of no benefit to the profession to rehearse it in this opinion. The complainants upon the hearing abandoned all claim of undue influence, and failed to establish any fraud on the part of defendants. There is abundant evidence in the record to support the conclusion of the circuit court that the conveyance by the father to his son John Turns, Jr., was made in good faith and for a valuable consideration.

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We, therefore, affirm the decree. John Turns, Jr., having disclaimed all interest in the premises, defendant Jennie Turns will recover costs against complainants to be taxed.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

SOTHAM *v.* MACOMBER.

1. BROKERS—FEES—VENDOR AND PURCHASER—CONTRACTS.
   Where plaintiff was engaged by defendants to sell a quantity of land at auction for $1,000 and his expenses, and for a stipulated part of all sales in excess of an agreed sum, the trial court correctly held that there could be no recovery for sales not actually made on terms satisfactory to the owners or on terms as offered before the sale.

2. SAME—EVIDENCE—RESPONSIBILITY OF BIDDER.
   It was also proper to receive evidence that one of the bidders at the sale was not pecuniarily responsible and was unable to comply with the terms publicly offered and was never in a position to buy the land on which he made a bid.[1]

3. EVIDENCE—CONFIDENTIAL COMMUNICATIONS—PRIVILEGE.
   Testimony of a stenographer, furnished at a sale of land by owner to broker, paid for out of the proceeds, as to matters learned as part of her employment, was admissible in an action by the broker for his commissions and was not subject to the rule of privileged communications.

[1] As to broker's right to compensation where purchaser procured by him is financially unable to perform his contract, see note in 20 L. R. A. (N. S.) 1168.

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Error to Montcalm; Davis, J. Submitted November 6, 1913. (Docket No. 82.) Decided April 7, 1914.

Assumpsit by Thomas F. B. Sotham against Esther Macomber, executrix, and Charles M. Miller, executor, of the estate of Allen Macomber, deceased, and others, for commissions and expenses as a broker. Judgment for plaintiff for less than the claimed amount and he brings error. Affirmed.

Laurence W. Smith, for appellant.

N. O. Griswold and *S. F. Kennedy,* for appellees.

MOORE, J. This action is brought to recover commissions claimed to have been earned by the plaintiff on the sale of various parcels of land in and about Lakeview, Montcalm county, Mich.; some of the sales being consummated and others, it is claimed, being defeated by the actions of the vendors. It is also sought to recover a percentage of the cost of conducting the sale.

The firm of Macomber & Bale owned many thousands of acres of wild and improved lands in and around Lakeview. Mr. Macomber died, and his wife, Esther Macomber, as executrix, and Charles M. Miller, as executor, with the will annexed, assumed the administration of his estate.

It is claimed by plaintiff as follows:

"That plaintiff should undertake to sell all the lands defendants owned about Lakeview.

"He was to arrange for, advertise, and conduct the auction sale of these lands, and was to receive the sum of $1,000 and his expenses in any event. A list price was placed on each lot, and in the event that the total sales amounted to more than the list plus the expenses of sale, including $1,000 for plaintiff, then and in that case such excess was to be equally divided between plaintiff and the defendants; the plaintiff receiving one-half. All expenses were to be borne by the defendants. * * *

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"It is claimed by the plaintiff that certain village property was put into the sale in the disposal of which he was to have no interest, except that these lots were to bear their *pro rata* of the general sale expense, which, in the event of a surplus, would inure one-half to his benefit."

This claim is not admitted by the defendants.

"The plaintiff claims also for the repairs necessarily made to his automobile, for parts and tires worn out in the sale service."

This claim is not admitted by defendants.

After the arrangement was made, an elaborate illustrated catalogue of 90 pages, containing maps, landscape views, pictures of State and other buildings, advertising for sale 111 tracts of land at auction, which was to be held September 6th, 7th, and 8th, and October 4th, 5th, and 6th, was published and freely circulated. This catalogue advertised special low-rate, round-trip excursion rates. The announcement was signed as follows:

"Lakeview, Michigan, July 15th, 1911.
"Estate of Allen Macomber, Deceased.
"Esther Macomber, Administratrix.
"Charles M. Miller, Administrator.
"Macomber & Bale.
"John J. Bale.
"Sotham & Sons Land Co.
"Carey M. Jones, Auctioneer.
"T. F. B. Sotham, Sale Manager."

At the close of the catalogue were printed 12 rules and regulations in relation to the sale. The following of which are important in this litigation:

"Rule IV.—Deposit. Whenever the auctioneer shall declare any lot (subdivision of lot, or combination of lots) sold, the buyer or buyers thereof shall forthwith deposit at least ten per cent. of the purchase price with the clerk of the sale as a first payment. Such deposits may be made in currency, bank draft, certificate of deposit or certified check, endorsed to the

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satisfaction of the clerk. In event any buyer should fail or neglect to satisfactorily settle such first payment, the auctioneer may declare sale void and thereafter resell the premises in question."

"Rule IX.—Terms: *Cash or its equivalent.* Half cash with mortgage on land purchased to secure payment of balance will be deemed the same as all cash. Earnest, capable, honest workers desiring to buy on smaller cash payments will be accommodated, but before bidding should arrange for credit with the sale manager. Such sales will be covered by contract. Interest on all deferred payments will be at the rate of six per cent. per annum. Time to suit purchaser within 5-year limit unless otherwise agreed.

"Rule X.—Settlements. The right is reserved to the vendors to declare off any sale or sales not satisfactorily settled for within ten days from date of such sale and to declare any payment or payments under Rule IV forfeited thereafter.

"Rule XI.—Commissions. One commission, of one dollar ($1.00) per acre, on each lot or subdivision of lot sold and satisfactorily settled for, will be paid land agents who comply with the following conditions. Said land agent must attend sale in person. * * * Such names must be filed at least twenty-four hours prior to clients' purchase at sale; otherwise the agent will forfeit any commission rights that could accrue hereunder.

"XII. Any and all statements, offers, bids, sales, payments or settlements made by buyer, seller or agents of either, at these auctions are subject to these rules. The right to interpret these rules is strictly reserved to and in the vendors."

Part of the lands were sold and part were not. The parties to this litigation could not agree as to the compensation due the plaintiff, and this suit was commenced by summons, followed later by a declaration on all the common counts in assumpsit. This was followed by a bill of particulars for "commission due as per contracts earned on the following pieces of real estate." Then followed the lot numbers and the expense account. The case was put at issue, and early in the trial the respective counsel made concessions

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that simplified the issues. It was conceded by defendants that the profits on the land sold were $5,485, less the expenses incurred, which, including $1,000 for plaintiff's salary, amounted to $5,062.32, and that if the lands sold on contract were to be counted as though sold for cash, there was due plaintiff $234.13. This made no allowance for automobile repairs, salaries to the sons of plaintiff for acting as chauffeurs, or for the making of a map; it being the claim of defendants that plaintiff was not entitled to any allowances on these claims, except for the map, and as to that the parties could not agree as to the amount.

The trial judge submitted these two claims to the jury, who returned a verdict of $25 for the map, and $300 for chauffeurs' salaries and automobile repairs, and a verdict and judgment were entered in favor of the plaintiff for $500.25. The defendants have not appealed. The plaintiff has brought the case here by writ of error.

The first question we will consider is whether the jury should have been allowed to assess some damages because certain village properties should have borne their *pro rata* share of the general sale expense. It was the claim of defendants that these lands were put in the catalogue, at the request of plaintiff, for advertising purposes only, and that plaintiff's claim that they should bear part of the expense was untenable. The court was of the opinion that in any event there was no showing which would warrant an intelligent apportionment *pro rata* of these expenses. Counsel does not suggest in his brief whether it should be upon the basis of values, or acreage, or number of lots. We agree with the judge that there is no basis for intelligently arriving at an amount for this purpose.

The special grievance of the plaintiff is that the court decided, as a matter of law, that he was not

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entitled to compensation as to various lots of land, where no sale was, in fact, made. It will not be necessary to discuss in this opinion each lot which was offered for sale, and struck off to a bidder, as is done by counsel in their brief. We will take up the most important items, and the ones most favorable to the claim of plaintiff. Those are lot 6 and lot 7.

We now quote from the brief:

"Lot 6 was struck off to Hiley Warner at $22,000 and sold to him. Lot 7 was struck off to the same buyer at $1,800, making a total of $23,800. Before the bidding started, Bale and plaintiff urged Warner to bid. Warner told them he couldn't comply with the rule as to 10 per cent. down, and defendant Bale told him to bid, and he would take care of him, give him time on the 10 per cent. and on the balance. Warner told him he thought he could interest other parties in it. It was struck off to him in the presence of defendants Bale and Miller.

"Bale told Warner that whatever arrangement he made with Sotham as to time was all right with him. Sotham told him he could have 20 days on the 10 per cent., and 90 days or longer on the balance, to be half cash and half mortgage or all cash. Accordingly Warner gave a check due in 20 days, which satisfied Sotham and Bale, but not defendant Miller, and one due in 10 days was substituted.

"Warner interested Meade, Sandell, Lambertson, and Chappell in the deal, and they agreed to finance him and give him one-fifth of the profits. Warner told Bale he had interested Lambertson and Chappell, and that they would back him. Then Sotham sent Exhibit 19 to Warner and to the bank at which the check was payable, attempting to change the terms and get the balance above the 10 per cent. in cash on the same day the check was due.

"Sotham and the vendors went to Belding the day the check was due, and met Warner and his people. The Belding people objected to the change in terms, and offered to pay the 10 per cent. check of $2,380 that day, and to bind themselves to pay the rest within 30 days, reserving the right to give a mortgage of $12,000. This was agreed to by all parties. Then

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the dispute arose over the form by which this agreement should be set forth. Defendant Miller wanted a bond to guarantee payment of Warner's bid, and would not sign a land contract setting forth the agreement that was reached, on the advice of his attorney. The check was not protested until after the Belding meeting. At that time they were ready to pay it. The financial ability of the Belding parties up to the $12,000 to be covered by mortgage was conceded on the trial.

"After this deal fell through, Sotham readvertised lots 1 to 7 for the October auction in his circular of September 23d, but they were not offered in that auction. * * *

"The first assignment of error relates to the court's allowing the witness Warner to answer the following question: 'Q. What property did you have in September, 1911?' (the time of the sale). Unless the test of our performance is the buyer's ability at the time of the sale to pay the purchase price, the question was immaterial, and the answer should not have been received. Under the agreement as to the conduct of the sale, the vendors—that is, the defendants —were to pass on all credits. This would necessarily negative the idea of any guaranty on the part of the plaintiff of the financial ability of any purchaser. Nowhere in the correspondence is any such idea hinted at. In this connection let it be noted from a reading of Exhibit 6, which forms the basis of the agreement, that plaintiff was bound only as a sale manager, and is not held as strictly as a broker would be. His duty consisted in working out a plan and putting it through. He was to run the sale and advertise it. He lacked many characteristics of a broker. But, even if he is considered as a broker, without an agreement on his part to guarantee the financial ability of a buyer, such ability or inability is immaterial in an action for commissions.

"Before citing authorities on this proposition, I desire to call the court's attention to another matter directly connected with it, viz., that, where a purchaser is presented who is ready and willing to sign a contract in compliance with his offer, the failure of the vendor to require such a contract is no defense to an action for commissions if the sale falls through,

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and to argue from that the proposition demonstrated by the cases that where buyer and seller enter into a contract of sale, the agent's commissions are not thereafter defeated by the financial inability of the purchaser to perform. Consequently it is our claim in this case, under this assignment, that Warner is to be treated as having entered into a binding contract to buy, and his financial ability to carry that out being immaterial, the question and answer excepted to should not have been received."

The defendants do not admit the truth of the statements of counsel as we have stated them, but it may be safely assumed counsel will make as favorable a claim for his client as the record will warrant.

The foregoing claim raises the pivotal questions in the case. Mr. Warner testified as to the extent of his property. When he gave the check referred to, he had not to exceed $100 in the bank. He had some horses and other personal property, all of which was chattel mortgaged. Exhibit 19 referred to in the brief of counsel for appellant, which we have quoted, reads:

"LAKEVIEW, MICH., Sept. 7, 1911.

"Hiley Warner, Orleans, Mich., to Macomber & Bale, Dr. to lots 1, 2, 3, 4, 5, 6, and 7 of land catalogue, $23,800.00. Due this day according to Rule 4 of the sale rules and regulations, a deposit of ten per cent., or $2,380.00, for which, purely as an accommodation to Mr. Warner, he was allowed to deposit a ten-day check, due on or before September 18, 1911. The balance of purchase price, $21,420.00, to be paid in cash on or before September 21, 1911, at the Farmers' & Merchants' State Bank of Lakeview, Michigan.

"N. B. Should the ten-day check for $2,380 not be paid on presentation September 18, 1911, the sale will be declared off, and bill rendered for such damages as may have been done. Should the check for $2,380 be paid on September 18, 1911, as agreed the said $2,380 will be held as a deposit under Rule 4, and forfeited as liquidated damages in event the balance of $21,420 is not paid in cash or its equivalent on the date and in the manner hereinbefore provided."

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This exhibit was prepared and sent by the plaintiff, indicating his understanding of the situation. Notwithstanding the impecunious condition of Mr. Warner, the defendants were willing that he should have the benefit of his bid, if he could get the Belding parties to do what it was his duty to do, if the bid was to remain good, and the defendants and Mr. Sotham went to Belding to see what could be done.

The plaintiff claims an agreement was made by all the parties at Belding, and cites the testimony of the attorney, Mr. Hubbell. This witness, after testifying to the conferences held by the parties, and to drawing a contract which was satisfactory to his clients, and to the production by Mr. Miller of papers drawn by the attorney for defendant, closed his testimony as follows:

"*Q.* They four didn't get together and agree it was what they wanted and that they would sign it, did they? *A.* Oh, no; the two sides didn't get together upon it."

The conference ended without the parties being able to get together, and later the $2,380 check given by Mr. Warner went to protest.

Following the Belding conference Mr. Sotham prepared and circulated in large quantities a circular letter reading in part as follows:

"Lakeview, Michigan.

"CLOSING SESSION. GRAND WIND-UP.

"Wednesday, Thursday and Friday, October 4th, 5th, and 6th, 1911. T. F. B. Sotham,
Sale Manager.

"LAKEVIEW, MICH., Sept. 23d, 1911.

"*Dear Sir:*

"Since last writing we 'woke up' and got busy adding attractive land bargains to those (lots 56 to 111 of catalog) originally set apart for the closing session Oct. 4, 5, and 6 of our Lakeview land auctions.

* * *

"Having revived somewhat from the disappointing

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shock of low prices at the September auction, and adjusted ourselves to the situation, we saw that at the sale prices the lands we had sold were yet the very cheapest really first-class lands in Michigan. * * * Again, certain other buyers were disappointed in their money arrangements, and while the vendors will aid our customers in every consistent way and will not crawfish on any sale, no matter how absurdly low the price, it is obvious that they cannot be cut off from the right to reoffer in our October auction any September lot not settled for.

"Therefore, kindly take notice that in addition to lots 17 and 21 (passed) we will be able to reoffer lots 6, 7, 22, 36, 37 and 38 in our October auction. You will see by the catalog that lot 6 is the celebrated Macomber & Bale home farm made up of lots 1, 2, 3, 4, and 5. * * * Now, if you missed coming to the September sale remember that we have these lots where you can get another chance at them. * * *

[Signed] "SOTHAM & SONS LAND CO.,
"By T. F. B. SOTHAM."

The auction sale in October was held, but these lands found no purchaser, and had not been sold at the time of the trial. It is not very important in what way Mr. Sotham is characterized in this transaction, whether he is called sales manager, with a salary and expenses, with the right to one-half the net profits, or whether he is called a real estate broker; in either event he must show either a sale or the production of some one able and willing to purchase according to the terms fixed in the contract between him and the vendors, or to take the property upon terms agreeable to himself and the vendors.

As bearing upon the last of these two propositions, it was entirely proper to inquire into the pecuniary responsibility of Mr. Warner, who was the bidder, and to whom the property was struck off. The record shows beyond any question that Mr. Warner was never in a position to buy the lands; that Belding parties were never present at the sale; and that

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though a conference was had with them at Belding, they and the vendors were not able to get together; and that nothing came of the extensive and expensive advertising, so far as securing a sale of these lands is concerned. The result of the ruling of the trial judge is that the plaintiff has been given a judgment for the balance due upon his share of the profits of all sales made, whether payment was made in cash, or partly in cash and partly upon land contract.

One other assignment requires attention. We again quote from the brief:

"13. This relates to permitting Miss Conant, the stenographer furnished the plaintiff, to testify in relation to Exhibit 43, the list she took from plaintiff's book of the list prices, the plaintiff claiming the communication is privileged. As appears on pages 8 and 9 of the record, in plaintiff's bill of particulars, Miss Conant's salary was a sale expense to which plaintiff contributed from the surplus. She was therefore as much his stenographer as the defendants'. * * *

"We submit that this communication, or, rather, this taking of information by a stenographer from records to which she is in confidence given access, demands the utmost protection. Its primary quality is confidence in nondisclosure. There can be no doubt that the universal opinion favors its maintenance. Compared with the benefit to a litigated case, if the privilege is abused the relation must terminate. The admission of the testimony was error. Its only purpose could be to dispute plaintiff when he says that his report of the list price of lot 94 contained in Exhibit 34 was an error on his part, unintentional and typographical, and that no such list was ever given him."

We have difficulty in understanding this contention. Mr. Sotham was the sales manager of defendants. Miss Conant was employed as stenographer to assist him in his duties, and was paid out of the expense fund, which, of course, came out of the proceeds of the sale of defendants' land. She owed no duty to Mr. Sotham that she did not owe to defendants, and

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it was not the duty of either of them to withhold any information from defendants as to what was being done to promote the sales. We discover no reversible error in the case.

Judgment is affirmed.

McALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

STEVENS v. JACKSON.

1. FRAUDS, STATUTE OF—REAL PROPERTY—CONTRACTS.
   An oral agreement between four persons who were interested in an estate of a decedent, and who entered into a written contract to buy the dower and homestead rights of the widow, that one of the four should pay $500 and one-fourth of the amount to be given the widow, was not void under the statute of frauds.

2. SAME—PRESUMPTIONS.
   At most only a presumption existed that the purchasers had equal interests and the presumption was rebuttable.

3. SAME—CONSIDERATION.
   Under conflicting testimony relating to the oral agreement, the issue was one for the jury and there was sufficient evidence of consideration to support the contract.
   McALVAY, C. J., dissenting.

Error to Allegan; Cross, J. Submitted November 13, 1913. (Docket No. 120.) Decided April 7, 1914.

Assumpsit by Carlotta Stevens and others against Charles Jackson for money due, etc. Judgment for plaintiffs. Defendant brings error. Affirmed.

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Charles R. Wilkes, for appellant.

Clare E. Hoffman, for appellees.

MCALVAY, C. J. *(dissenting)*. Plaintiffs brought suit, in an action of assumpsit, against defendant to recover the sum of $500, which they claim he by oral agreement promised to pay them. This suit resulted in a verdict and judgment for plaintiffs. The case is brought here for review upon a writ of error by defendant. In order to have any understanding of this suit and the relations of these parties to each other in the transaction out of which it arose, it will be necessary to make a statement of the facts.

All of the parties to this suit are the sole heirs at law of William Jackson, who died testate June 21, 1910. Besides these children, there survived him a widow, who was their stepmother, and who elected to take her statutory dower and homestead rights in his real estate as his widow. In 1905 William Jackson had conveyed to defendant Charles Jackson, his son, by warranty deed, 40 acres of land in Monterey township, Allegan county, Mich., known as the "wood lot," for the cash consideration of $2,500. His wife, Lucy Jackson, refused to join in the deed, and it was provided therein that the conveyance was made subject to her dower rights. At the time of his death, William Jackson owned real estate consisting of a farm of 102 acres in Monterey township and a house and lot occupied by him as his homestead in Hopkins village, Allegan county. The farm was appraised at $9,000 and the homestead at $1,800. The widow claimed dower rights in the farm, in the 40 acres deeded to defendant, and homestead rights in the house and lot at Hopkins. The total valuation of the three parcels was between $12,000 and $13,000.

On August 21, 1910, the four heirs of William Jackson and his widow met at the probate office at Allegan,

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and made a settlement, and entered into an agreement in writing whereby these heirs purchased all of the dower and homestead rights of the widow in these three parcels of land. The material portions of this agreement read as follows:

"This agreement entered into this 22d day of August, 1910, by and between Lucy M. Jackson, party of the first part, and Charles S. Jackson, Minnie Opperman, Carlotta Stevens and Mary B. Knoblock, heirs at law of William Jackson, deceased, and devisees under his will, parties of the second part: Said party of the first part for and in consideration of the covenant herein undertaken by second parties doth hereby release unto said second parties all her right, title and interest in and to the estate of William Jackson, deceased, either under the will of said William Jackson, deceased, or under the statute as his widow and does hereby convey to said parties of the second part all her interest in and to the following described real estate, to wit, [giving description of premises], as dower homestead rights, or otherwise. To have and to hold the same forever. * * * [Omitting the agreement on the part of the heirs to sell and set over to the widow the household furniture and certain personal property and to lease the homestead to her for five years.] Second parties further agree to pay to the first party the sum of eighteen hundred (1,800) dollars on or before the first day of June, 1911, with interest at five per cent. after due. * * *"

This instrument was duly executed, witnessed, and acknowledged by all the parties. Its terms and conditions were in all respects performed. The four heirs of William Jackson borrowed from the Hopkins State Bank the sum of $1,800, giving their joint and several promissory note for that amount, and they later paid said note out of the proceeds from the sale of said farm; each paying one-fourth of said $1,800. The foregoing statement of facts is undisputed.

The dispute in this suit arises out of the claim made by the three plaintiffs that on the same day, and shortly before the dower and homestead rights of

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the widow, Lucy Jackson, were sold and conveyed by her to the four children equally, as appears from the writing above referred to, a verbal agreement was entered into by which it is claimed Charles Jackson, defendant, agreed to pay, for the release of the dower interest in his 40 acres, $500 of the purchase price of $1,800 and one-fourth of the balance of $1,300. Defendant, Charles Jackson, denied that he made any verbal agreement with the plaintiffs or any of them. The court, over objections of counsel for defendant, allowed plaintiffs to testify at length relative to this agreement.

At the close of plaintiffs' case, a motion was made by counsel for defendant for a directed verdict, upon several grounds, viz.: Because the claimed verbal agreement tended to contradict the written instrument which later all parties entered into; because the verbal agreement was within the statute of frauds relating to the sale of an interest in lands; because it was without consideration; because there was a misjoinder of plaintiffs; the action arising upon the agreement claimed to have been made was several and not joint. This motion was denied by the court, and an exception taken. The trial of the cause proceeded, and the case was submitted to the jury upon the charge of the court.

The errors assigned and relied upon relate to the refusal of the court to grant the motion for a directed verdict in favor of defendant; to the admission of certain testimony; to the refusal to give certain requests to charge; and upon certain portions of the charge as given. The most important contention on the part of appellant is that raised, among others, as a ground for an instructed verdict, namely, that this verbal agreement related to a sale of an interest in lands and was within the statute of frauds requiring such agreements to be in writing. At the time of making this

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verbal agreement, these parties were about to, and did later on the same day, acquire by purchase all of the dower and homestead interests of their stepmother in all of the real estate of their ancestor in which she was interested. By this claimed agreement defendant was to pay $500 for the widow's dower interest in the 40 acres he had purchased from his father, and each was to pay a one-fourth of the balance of $1,300, and plaintiffs testified that they were not purchasing, and did not know until after the commencement of this suit, that they had purchased any interest from the widow in defendant's land. Each of the plaintiffs testified that, after this suit was begun, she executed and tendered to defendant a quitclaim deed of all interest in the 40 of defendant. This agreement, if made, was in contemplation of a settlement with the widow and a transfer of all her interest in this property to these parties which was made later on the same day, and which conveyed to each one of them a one-fourth of the widow's interest in all of this real estate, including defendant's 40 acres, for which each paid one-fourth of the purchase price agreed upon. That each received an interest in lands by this conveyance is not disputed, but it is contended that the agreement upon which suit was brought was not between the parties to the conveyance but only among purchasers. That agreement, however, contemplated acquiring an interest in real estate by defendant, and what was done in furtherance of it will be presumed to have been intended; and, having each acquired a quarter interest in all the widow's dower and homestead rights in all the real estate, it will be presumed that they contemplated the only possible means whereby defendant could acquire the dower interest in his land, which would be by transfer to him from each plaintiff of her interest therein.

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We do not find in these facts any performance which would satisfy the statute, and therefore must conclude that the verbal agreement was within the statute of frauds and void. The court should have directed a verdict in favor of defendant upon that ground. It will not be necessary to consider other questions presented.

The judgment of the circuit court should be reversed, and, as this conclusion would dispose of the entire case, a judgment should be entered in this court in favor of defendant and against plaintiffs.

STONE, J. I am unable to agree with the result reached by Justice MCALVAY in this case. In my opinion the contract set forth in the special count of the declaration, as well as the one claimed under the common counts, and testified to by the plaintiffs, was a valid oral contract, and it did not in any manner alter, contradict, or vary the terms of the written agreement by which the parties, both plaintiffs and defendant, purchased from Lucy M. Jackson her interest in and to the estate of William Jackson, deceased, "either under the will of said William Jackson, deceased, or under the statute as his widow," and whereby she conveyed her interest to the parties to this suit. The agreement sued upon in no way affected the agreement of purchase from the widow, but was one whereby the plaintiffs and defendant agreed how the purchase money should be paid, as between themselves. It is the claim of the plaintiffs that, in consideration of their agreement to pay a portion of said purchase money, the defendant agreed that, of the $1,800 to be paid, he would first pay $500 of said sum, in consideration of his interest in the 40 acres (he having before purchased the same from William Jackson, subject to the dower interest of Lucy M. Jackson), and further that he would pay one-quarter of the remainder of $1,300; that he failed

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to do this, and only paid one-quarter of the whole sum of $1,800; and that, he having failed to pay as he agreed to do, he is indebted to them in the sum of $375, which they jointly had paid for him, as joint makers of the note.

In my opinion the agreement claimed by the plaintiffs was not within the statute of frauds, and did not relate to a transfer of an interest in lands, within the meaning of that statute. The conveyance of lands was made by a third party to the parties to this suit, and we are here dealing with a claimed contract between the latter as to how the purchase money should be paid, and the portion to be paid by each.

At most there was a mere presumption that the interest of each purchaser was equal, and that presumption was rebuttable. *Campau* v. *Campau,* 44 Mich. 31 (5 N. W. 1062); 38 Cyc. p. 74. As tending to show the interest of each, it would be competent to show the amount of purchase money paid by each. This would not infringe or contravene the statute of frauds.

Here a question of fact was presented as to the amount each of the parties agreed to contribute of the purchase money. The plaintiffs claim that, by reason of his interest in the property, the defendant agreed to pay $825 of the $1,800. This he did not do. They, having jointly paid for him, and for his use and benefit, $375 of that sum, seek by this action to recover it back. It would seem that there was a sufficient consideration for such promise, if made, and that such contract was made jointly with the plaintiffs. In my opinion a question of fact only was involved, and it was properly submitted to the jury.

The record showing no reversible error, the judgment of the circuit court should be affirmed.

BROOKE, KUHN, OSTRANDER, BIRD, and STEERE, JJ., concurred with STONE, J. MOORE, J., did not sit.

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HAPKE *v.* DAVIDSON.

1. CONTRACTS—CONSTRUCTION—IMPLIED CONTRACTS—SERVICES.
   Under a written agreement of plaintiff to supervise the removal of a beet sugar factory from one location to another, and to rebuild the factory and assist in its operation for a period of months, plaintiff to furnish an engineer to superintend the erection of the machinery and one for the erection of the building and to pay wages, salary, and expenses and furnish architect's plans, etc., with a guarantee that the plant should operate as economically and efficiently as before, in consideration whereof defendant promised to pay $15,600, as stated, in detail, in the agreement, which also provided that both parties should use their best efforts to complete the removal and reconstruction of the factory and to promote its successful operation up to February of the following year, and that plaintiff should assist in the operation of the factory up to that time, services and labor of the plaintiff in securing a site, negotiating for tracks and rates on shipments and purchases, and securing acreage from farmers to grow beets were not included by the terms of the contract.

2. SAME—INTERPRETATION.
   It is a rule of construction of contracts that the court should endeavor to determine the intention of the parties, and should examine and give effect to every word or phrase, so far as practicable.

3. SAME—ADMISSIONS—WEIGHT OF EVIDENCE.
   But an admission of the plaintiff contained in a letter, that he did not intend to compel the defendant to pay for extra services, if defendant, as he had previously promised, would assist him financially, taken with the presumption of fact that services performed should be considered as included by the provisions of the contract, *held*, to require the court to set aside the verdict and judgment as against the weight of evidence.

4. EVIDENCE—WRITTEN AGREEMENT—PAROL EVIDENCE.
   Negotiations prior to the execution of a contract, being merged in the written agreement, the trial court, in an

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action of assumpsit for extra services performed by plaintiff, correctly excluded correspondence tending to show that the extra items were intended to be covered by the contract; and evidence of a prior conversation was also incompetent.

5. AMENDMENTS—BILL OF PARTICULARS—LIMITATION OF ACTIONS.
Where the plaintiff, without obtaining leave of the court, filed an amendment to his bill of particulars and thereby added items of a later date, claimed by defendant to be barred by limitation, and where the trial court denied a motion to strike the amendment from the files, based on the objection that the items added were claimed to be new and distinct and because the statute of limitations had run against them, the court acted within its discretion in permitting the amendment to stand.

6. FRAUDS, STATUTE OF—ASSIGNMENT—IMPLIED CONTRACT.
Where it was claimed by the defendant that services for which plaintiff claimed compensation would be a liability against another party, a corporation, which had been incorporated to take over the factory erected under the agreement, the contention that the action would be barred by the statute of frauds was not tenable.

7. SET-OFF AND COUNTERCLAIM—PARTIES—CORPORATIONS.
An indebtedness to a corporation, of which the defendant in the action was the controlling stockholder, could not be used as an offset against plaintiff's claim for an amount due from the individual.

Error to Bay; Collins, J. Submitted November 24, 1914. (Docket No. 27.) Decided April 7, 1914.

Assumpsit by Theodore Hapke against James Davidson for services performed. Judgment for plaintiff. Defendant brings error. Reversed.

Hall & De Foe, for appellant.

Joslyn & Houghton, for appellee.

KUHN, J. The defendant, James Davidson, prior to February 20, 1904, was interested in a factory at Dresden, Ontario, for the manufacture of beets into sugar. The operation of the factory not being suc-

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cessful in that locality, he made a contract with the plaintiff, Theodore Hapke, who was an expert agriculturist, to remove the same, which contract in terms was as follows:

"This agreement, made February 20th, 1904, at Detroit, Michigan, between Theodore Hapke, of the city of New York, party of the first part, and James Davidson, of West Bay City, Michigan, party of the second part, Witnesseth:

"1. Said party of the first part hereby agrees to supervise the removal of the Beet Sugar Factory of the Dresden Sugar Co., Ltd., from its present location at Dresden, Ont., to Janesville, Wis., or such other place as the said party of the second part may designate, and also the re-erection and reconstruction of said factory at the place to which it shall be so removed and to also assist during the operation of the same up to February 1st, 1905.

"2. Said party of the first part also agrees to furnish for such work a first class engineer to superintend the erection of the machinery of said plant, and also another first class engineer to supervise the re-erection of the building thereof; both said engineers shall devote their entire time and attention to said work until it is all accomplished and complete, and said factory in successful operation; their said services shall continue during the operation of said plant when so removed and re-erected, but not later than February 1st, 1905.

"3. Said party of the first part agrees to pay all the wages, salary and expenses of the said two engineers, also his own office expenses of every nature and description, including telegrams and correspondence, and all traveling expenses; and he further agrees to furnish full details, plans and specifications for the removal and re-erection of said plant as aforesaid, that no material changes shall be made therein without the approval of said party of the second part; and said party of the first part also guarantees that said factory shall be so re-erected in its new location that it can be there operated as economically and efficiently as heretofore.

"4. In consideration of this agreement and the performance thereof by said party of the first part, the

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said party of the second part hereby agrees to pay him, in full, for all services and expenses on account of said work, the sum of fifteen thousand six hundred dollars, as follows:

"One thousand dollars at the signing of this agreement, and the balance in equal monthly installments of thirteen hundred and twenty-seven dollars and thirty-three cents each, on the first day of each and every month thereafter, commencing April 1st, 1904, until said balance is paid.

"5. It is understood and agreed that said party of the second part is to pay for all the work, labor, freight and other expenses attendant upon such removal and re-erection of said plant, except such expenses as are herein specified to be borne by said party of the first part.

"6. It is further agreed that said party of the second part will use his best endeavors to expedite said work of removal and re-erection, and that both of said parties hereto will faithfully use their best efforts to accomplish the removal of said factory, its re-erection as aforesaid, and its successful operation in its new location up to February 1st, 1905.

"In witness whereof, said parties have hereunto set their hands the day and year first above written.

[Signed] "THEO. HAPKE.
[Signed] "JAMES DAVIDSON."

At the time of the execution of this contract, the defendant delivered to the plaintiff the following writing:

"To Whom It May Concern:

"Mr. Theodore Hapke has been employed by me to superintend the removal of the beet sugar factory now on premises near Dresden, Ontario, to Janesville, Wisconsin, or such other place as I may designate; he is authorized to make all necessary arrangements respecting the entry of the property into the United States custom house, and to act for me as my agent in the re-erection of said factory at the place which I may designate; and to do what may be incidentally necessary to the proper removal and re-erection of said factory.

"JAMES DAVIDSON."

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The factory was removed, re-erected, reconstructed, and operated at Janesville, and the plaintiff performed all of the work required of him under the agreement of February 20, 1904, and the defendant paid, as contracted, the entire sum of $15,600. It is the claim of the plaintiff, in practically the language of a request to charge as given by the court, that:

"After February 20, 1904, he rendered certain services and expended certain moneys in connection with securing a site for the factory at Janesville and negotiating with the railroad companies for joint railroad tracks, and in securing acreage for beets from farmers in the vicinity, and in the payment of agents' commissions to solicit the farmers to grow such beets, and in negotiating with the railroad companies for securing rates on machinery shipped to Janesville, and upon sugar shipped from the factory at Janesville, and in negotiating with railroad companies for rates upon coal, limestone, and other supplies required in the operation of such factory, and in negotiating with railroad companies in regard to demurrage charges on cars of coal and beets, and in going to Milwaukee in regard to the entering of the machinery into the country from Dresden, and in going to Milwaukee and Washington to secure the release of certain bonds given by the defendant in connection therewith, all of which said services and expenditures of money plaintiff claims are extra services and expenditures not included in the written contract of February 20, 1904, for which the defendant should compensate and reimburse him; and the plaintiff claims that he performed these extra services and made such disbursements at the request of the defendant, and upon the promise of the defendant to pay him well for such services, and to reimburse him for such expenditures, and that the plaintiff called the defendant's attention to such services and expenditures from time to time while the services were being performed and the expenditures were being made, and that the defendant told him he would pay him for such services and reimburse him for the expenditures, but he did not do so, nor did he refuse to pay him for such services and reimburse him for such expenditures, nor deny

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liability therefor, but said to the plaintiff, in substance, 'What is a few thousand dollars to you if I help you to make several thousand dollars by going in with you in the building of sugar beet factories?' and the plaintiff claims that he did not relinquish his right to be paid any money for such services and disbursements, nor did he agree to be compensated for such services and disbursements by the defendant's promise, if carried out, to interest himself with the plaintiff or back the plaintiff in the removal of beet sugar factories, but that the plaintiff did forego presenting a bill or insisting upon payment in money at the time of such conversation with the defendant for such services and disbursements, relying upon the defendant's promises that he would back him up or help him out with a moderate amount of capital in the removal of sugar factories, but that defendant failed and refused to interest himself with the plaintiff or furnish a moderate amount of capital in the removal of the sugar factories, and that when defendant did so refuse and fail to interest himself with the plaintiff in the removal of sugar factories, or invest a moderate amount of capital, the plaintiff presented a bill for the extra services claimed to have been performed by him, and for certain disbursements, and demanded payment therefor in accordance with defendant's promise to pay."

The claim of the defendant, as given in the charge of the court, was as follows:

"The defendant denies entirely that he is indebted to the plaintiff in any sum for any such claimed service or expenditure, insisting that if such services were rendered and moneys expended, all of which he questions in amount, they were rendered and expended by the plaintiff without any request upon the part of defendant that plaintiff should do so, and without any knowledge that plaintiff ever expected to be compensated or reimbursed therefor, but rather that plaintiff understood that such service and expenditure were a part of the agreement of February 20, 1904, which he was called upon to perform and do."

The issue thus formed being submitted to the jury, a verdict in the sum of $1,917 for the plaintiff was

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returned. Judgment being had thereon, the cause was brought to this court by writ of error.

The numerous assignments of errors have been conveniently grouped by counsel for defendant, and under appropriate headings have been discussed by counsel in their briefs:

Does Contract of February 20th Include by its Terms Items of Plaintiff's Claim? It is the contention of the defendant that the economical, efficient, and successful operation provided for in section 3 of the contract necessitated the securing of a site where railroad tracks could be secured, sufficient acreage of beets, reasonable freight rates upon machinery and material shipped in, coal, limestone, and other supplies required, and upon the manufactured product shipped out, and all things which must receive attention necessary to the successful operation of a manufacturing plant, and which tend to affect the profits of the owner, and that the provision in the contract that the plaintiff would use his best efforts towards the successful operation of the factory up to February 1, 1905, called upon him to do all the things he claims as extra services. It is the contention of the plaintiff that the agreement provides simply for an engineering and mechanical proposition, and that the matters in controversy are incident only to the success of the enterprise, and not to the successful operation of the factory. Having in mind the well-established rule that in construing a contract the endeavor should be to arrive at the intention of the parties, and that in doing so all its parts must be examined and effect given to every word and phrase, if practicable (*Plano Manfg. Co.* v. *Ellis*, 68 Mich. 101 [35 N. W. 841]), we are of the opinion that the contention of the plaintiff and the conclusion that the trial court came to is the correct one. The contract did not require, and the plaintiff did not undertake to guarantee, that the

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enterprise should be a success and the venture profitable. He did contract to supervise the mechanical part of removal and reconstruction so that the machinery would operate as economically and as efficiently as before, up to February 1, 1905. That it did so is unquestioned. We do not think that the items of plaintiff's claims submitted to the jury can be said to be covered by the terms of the agreement.

No Implied and No Express Agreement Other Than in Contract February 20, 1914. It was claimed by the plaintiff and denied by the defendant that the services performed by plaintiff for the recovery of which this suit is brought were done at the instance and request of the defendant, with his knowledge and approval, for his special benefit, and were received by him. The issue thus made was submitted as a question of fact for the determination of the jury. It is urged by the defendant that it is clear from the correspondence of the parties that it was the understanding of the plaintiff that the services for which compensation is now claimed came under the contract, and that no claim was made by him for extra services until April 5, 1905, when he wrote a letter, in which he said:

"As to the bill for extra services, I did not intend to make you pay for any extra services rendered, since according to your promise given more than a hundred times, you would help me out at any time with a moderate amount of capital in new deals, but you now flatly refuse to do anything for me. This shows that you do not appreciate for a minute the hard work I did for you, and instead of canceling the charge for extra services I now request and demand remittance."

It is urged that this letter shows that the services rendered were voluntary, and with no expectation at the time of rendition that they were to be compensated for, and that it was only the failure of the de-

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fendant to carry out another arrangement to assist plaintiff in other factory deals that caused him to make his claim for extra services. It is plaintiff's contention that he expected compensation at the time the services were rendered, and that it was agreed upon that he should have it; that the letter simply shows that he felt kindly towards the defendant, and did not intend to make defendant pay for these services in case their business relations continued. We are strongly impressed, however, that the significant statement in the letter of April 5th showed the true intent of the plaintiff not to charge the defendant for the services when they were rendered, especially when considered in connection with his oral testimony when he said, "My intentions were not to charge him if he would do what he promised to do for this work," and also the fact that he kept no record of the time spent in extra services. It is also to be presumed, not conclusively, but as a matter of fact, that whatever services plaintiff rendered were rendered in performance of the contract. The services might have been rendered in performance of the contract, and the statement in the letter, "I did not intend to make you pay for extra services rendered," etc., we think, is clearly an admission that when they were rendered they were rendered in performance of the contract. The presumption referred to and the letter and corroborating evidence are so persuasive, to our minds, that we are of the opinion that the circuit judge should have granted the motion for a new trial on the ground that the verdict was clearly against the weight of the evidence. As this conclusion necessitates sending the case back for a new trial, we shall consider some of the other questions raised on this appeal.

Proofs Affecting Making Contract February 20, 1904. The circuit judge held and instructed the jury that there could be no recovery for services per-

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formed or the expenditures made prior to February 20, 1904, for the reason that all these matters had merged in the contract. The defendant offered in evidence certain correspondence between the parties prior to that time, and also endeavored to show conversation which took place between the parties in the office of the attorney at the time the contract was made. In the letter of February 13, 1904, written by the defendant to plaintiff at Janesville, he said, after discussing the removal of the factory in question:

"And of course we would also want it distinctly understood that we could not allow anything for any promotion, expenses or anything of that kind."

It is clear that the purpose of offering this letter and a draft of the proposed contract made previous to the meeting in the attorney's office, when the agreement was actually signed, was to vary the terms of the contract as construed by the court, and was an effort to show that the claimed items for extras were intended to be within the terms of the agreement. The rulings of the court in excluding these writings were proper. It must be assumed that the contract as made was the culmination of the negotiations between the parties, and, its terms not being ambiguous, these writings were inadmissible. *Eaton* v. *Gladwell,* 108 Mich. 678 (66 N. W. 598); *Mouat* v. *Montague,* 122 Mich. 334 (81 N. W. 112); 17 Cyc. p. 596. The evidence of the conversation had before the contract was also inadmissible. *Cohen* v. *Jackoboice,* 101 Mich. 409 (59 N. W. 665); *R. K. Carter & Co.* v. *Weber,* 138 Mich. 576 (101 N. W. 818); *Wallace* v. *Kelly,* 148 Mich. 336 (111 N. W. 1049, 118 Am. St. Rep. 580); *International Text-Book Co.* v. *Marvin,* 166 Mich. 660 (132 N. W. 437).

Bill of Particulars and Amendment Thereto. Without leave of the court, on June 6, 1911, plaintiff filed an amendment to his bill of particulars, by which

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amendment the limit of 1904, fixed as to several items, was advanced one year, making the same 1905. On June 11, 1911, the defendant entered a special motion to strike such amendment from the files, for the reason, in substance, that the same was filed without leave of court, and that it covered new and distinct claims of plaintiff against defendant after the statute of limitations had run, and after the taking of the testimony of several witnesses. The hearing on this motion was postponed until the trial of the cause, at which time the court held the amendments properly made. The mere change in the date did not, in our judgment, introduce a new cause of action, and, under the rule announced in *Pratt* v. *Montcalm Circuit Judge,* 105 Mich. 499 (63 N. W. 506), unless this is the result, the amendment is proper. As stated in 1 Enc. Pl. & Prac. p. 564:

"The test is whether the proposed amendment is a different matter, another subject of controversy, or the same matter more fully or differently laid to meet the possible scope and varying phases of the testimony."

See, also, *Connell* v. *McNett,* 109 Mich. 329 (67 N. W. 344); *City of Detroit* v. *Wayne Circuit Judge,* 125 Mich. 634 (85 N. W. 1); *Jones* v. *Pendleton,* 151 Mich. 442 (115 N. W. 468); *Croze* v. *Land Co.,* 153 Mich. 363 (117 N. W. 81). The allowance of an amendment to the bill of particulars is discretionary. *City of Battle Creek* v. *Haak,* 139 Mich. 514 (102 N. W. 1005).

Statute of Frauds. The Rock Island Sugar Company was incorporated on March 4, 1904, for the purpose of owning and operating the Janesville plant. It is claimed that compensation for any services or expenditures as claimed by plaintiff, if resting on an implied contract, would create a liability against the sugar company, and not against the defendant, as the benefit would accrue to it, and not to him, and if this

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is true, the action would be barred by the statute of frauds. The theory upon which this case was submitted to the jury was that the services rendered and the expenditures made were made at the request of the defendant. There is nothing in the record to show that the items of plaintiff's claim arose otherwise than through plaintiff's dealings with the defendant, with whom he had his correspondence and conversations. We are not impressed that there is any merit in this claim.

Set-Offs. The claim to set-offs arose from the following writing:

"MR. M. R. OSBURN,
"Mgr. Rock County Sugar Co.,
"Janesville, Wis.

"*Dear Sir:*

"I herewith offer to buy your total output of dried beet pulp and dried molasses beet pulp manufactured by you during the beet slicing season of 1904 and 5 at the price of $12.00 per ton in bags f. o. b. cars Janesville.

"Yours truly,
"THEO. HAPKE.

"Accepted:
"Terms (20) twenty days net cash.
"ROCK COUNTY SUGAR COMPANY,
"By M. R. OSBURN, General Manager.
"JAMES DAVIDSON.
"THEO. HAPKE."

In a notice of set-off it was defendant's claim that plaintiff owes, as a result of this contract, $2,526.14 for beet pulp delivered by the sugar company to plaintiff. It is plaintiff's position that he also has a claim against the sugar company as an offset to this claim. It quite clearly appears from the record that plaintiff's dealings with the sugar company were separate and distinct from his business relations with the defendant. The fact that the defendant owned practically all of the stock of the sugar company did not alter the fact that it was a separate and distinct legal

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entity. It was not a party to this litigation. Plaintiff could not urge his claim against the sugar company in this litigation, and so its claim could not be offset against plaintiff's present claim.

Other assignments of error relate to the charge of the court, admission of testimony, and limiting cross-examination. We are convinced that there is no merit in these contentions, as no prejudicial error was committed.

However, for the reason stated, the case will be reversed, and a new trial granted.

McALVAY, C. J., and BROOKE, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

CHURCHILL *v.* HOWE.

LIENS—TRUSTS—RESULTING TRUST—EQUITY.

Where complainant loaned money to defendants, in reliance upon a deposit in escrow of a deed with complainant, who had charge of the collection of the purchase price to be paid for the property conveyed, and defendants, dealing with the grantee direct, obtained the payment to them of nearly all the amount due, which they invested in real property and later traded the place for another, there was no violation of trust shown which would entitle complainant to a lien upon the realty obtained by the defendants; nor did the transaction fall within the exception to section 8837, 3 Comp. Laws (4 How. Stat. [2d Ed.] § 10677), abolishing resulting trusts except in case of violated trust or wrongfully taking title to lands in the name of the agent or trustee.

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Appeal from Emmet; Mayne, J. Submitted January 8, 1914. (Docket No. 24.) Decided April 7, 1914.

Bill by Charles L. Churchill against George Howe and Ella Howe for the enforcement of an equitable lien on real property. From a decree for complainant, defendants appeal. Reversed

A. S. Hinds, for complainant.

Halstead & Halstead, for defendants.

The bill in this case is filed for the purpose of having the sum of $616.55 declared to be a lien upon certain real estate now owned by defendants, as tenants by the entireties, and, in case of nonpayment of said sum, for the sale of said premises. The facts giving rise to the litigation are briefly as follows: Prior to 1908 the two defendants owned a farm in Oceana county which they sold to one John W. Jackson for the sum of $4,000. Some defects appearing in the title, Jackson refused to pay the full purchase price until they were remedied, whereupon the deed was deposited with the complainant in escrow. Mr. Jackson paid various amounts, including a mortgage, aggregating $2,125. On April 21, 1908, there remained unpaid on account of the deed $1,123.25. Prior to this the defendant George Howe wrote several letters to the complainant, complaining about Jackson's delay in paying the balance of the purchase price, and asserting that he was badly in need of money. On April 3, 1908, he wrote as follows:

"I do need some money, as the man that I bought of wants to go west, and is waiting for me to settle. Now, if you can advance me $680, and leave the rest until it's settled, I can get along all right, and not get into any trouble here. I will be very thankful indeed if you will do that."

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Again on April 16th, he wrote:

"Some two weeks ago I wrote you for some money at your suggestion. Now, I am very liable to lose what I have put into this place, $750, if I do not get this money from you. The people I bought of are living with me at my expense, and I can't see why my money is held by you, and is not paid. Now, I want to know what to expect from you by return mail. This has been a trouble and expense to me all winter. If you had done as I wanted you to do, and paid Mr. Bell $25 for a quitclaim deed, I would have been money ahead. Now, Mr. Churchill, I have got to have this money right away. I would rather you would pay this $25 to Geo. Bell, and settle the matter up at once."

Following this, and on April 21st, complainant sent to defendant George Howe a draft for $750, which was cashed by defendant on April 27, 1908, and the proceeds thereof paid upon the property he was then purchasing. Later, and on February 17, 1910, defendants traded this land for the land now owned by them described in the bill of complaint upon which it is sought to attach a lien. It is conceded by defendants' counsel that the exchange of properties has no effect upon the rights of complainant; that is, if complainant was entitled to a lien upon the property first purchased, he has the same right as to this property. After receiving the $750 from the complainant, defendant Howe corresponded with Mr. Jackson, personally urging him to pay the amount still due upon the escrow deed directly to him, and on February 2, 1909, Jackson sent his check to the defendant Howe for $900. Instead of reimbursing the complainant out of the moneys received upon said check, defendants appropriated it to their own use. After the $900 was paid, there still remained $133.45 unpaid on the escrow deed. As soon as complainant learned that Jackson had paid this sum directly to the defendants, he sent his attorney to them and demanded a settle-

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ment. Although admitting that they owed the amount of money claimed, they declined to secure its repayment by executing a mortgage on the property or otherwise. Complainant thereupon notified Jackson to pay no more money to the defendants, and he did pay the $133.45 to the complainant, thus reducing the $750 loan to $616.55, the amount for which the lien is claimed. Insolvency of the defendants is charged in the bill. Defendants caused their appearance to be entered in the proceeding; but neither answered nor demurred. After a hearing in open court, in the course of which the facts as set out in the bill were proven by the complainant, the court below entered a decree declaring the said sum to be a lien upon the lands described in the bill, and now owned and occupied by the defendants, ordering repayment, and, in default thereof, the sale of the property. From this decree, defendants appeal.

BROOKE, J. *(after stating the facts).* It is the claim of counsel for the appellants that assuming, as we must, the truth of all the allegations contained in the bill of complaint, no case is here made out for equitable relief. Uses and trusts are abolished by section 8829, 3 Comp. Laws (4 How. Stat. [2d Ed.] § 10669), except as they are saved by statutory enactment. Section 8837 provides that section 8835 shall not extend to cases where the alienee named in the conveyance (1) shall have taken the same as an absolute conveyance in his own name, without the knowledge or consent of the person paying the consideration, or (2) when such alienee, in violation of some trust, shall have purchased the lands so conveyed, with money belonging to another person. The claim of the complainant is that this case falls within the terms of the exception stated in the latter part of section 8837 (4 How. Stat. [2d Ed.] § 10677); that is, that the defendants in this case in violation of some trust pur-

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chased the lands described in the bill of complaint, or at least those which were exchanged for said lands. We find ourselves unable to agree with complainant's position. It would seem to be quite obvious that the title to the land first purchased was taken in the names of the defendants with the knowledge of the complainant, for the letters indicate that the $750 was advanced for the purpose of aiding defendants to complete the purchase of those lands.

We are unable to discern under the admitted statement of facts any trust violated by the defendants in the purchase of the first lands. The money was advanced by the complainant to the defendants for that purpose. It is true that complainant believed that in advancing said money he would be able to reimburse himself from the moneys to be paid by Jackson on the escrow deed. He, however, made no conditions with the defendants when the money was paid over to them, and in using it as they did, and acquiring the title to the property in question in their own names, they certainly violated no trust. It is not apparent nor inferable from their acts that at that time they even entertained a disposition to defraud the complainant. Their fraudulent conduct commenced when later, through correspondence, they induced Jackson to pay the $900 directly to them, disregarding their obligation to the bank. While their conduct in the premises is concededly dishonest, disreputable, and fraudulent, we are of opinion that under the admitted facts they violated no trust and committed no fraud at the time the purchase of the lands was made. *Thompson* v. *Marley*, 102 Mich. 476 (60 N. W. 976); *Wheeler* v. *Reynolds*, 66 N. Y. 227.

The decree of the court below will be reversed and the bill of complaint dismissed, but without costs.

MCALVAY, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

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CONRADSEN v. OSCEOLA CONSOLIDATED MINING CO.

MASTER AND SERVANT—NEGLIGENCE—WARNING—MINES AND MINING—DUTY TO NOTIFY SERVANT OF DANGER.

Where plaintiff was one of a crew which was sinking a winze in a copper mine, and two of the men worked in the day shift and two at night, and the duty of determining whether or not blasts consisting of several charges of dynamite had fully exploded rested upon the miners, and where it was impossible to tell from the number of explosions, which often occurred simultaneously, whether or not some of the charges remained unexploded, and it appeared from the evidence that the day shift, which preceded plaintiff at the work, had drilled seven holes and had heard two blasts, and they made an examination and believed that all the charges had been fired, but were mistaken, and plaintiff sustained injuries after making an examination of the condition in the pit, and it was not shown what information, in addition to that which plaintiff was able to learn from inspection, could have been given him by the preceding shift, which would have apprised him of the danger, or that more skillful inspectors could have been employed, a verdict should have been directed for the defendant mining corporation.[1]

Error to Houghton; O'Brien, J. Submitted January 8, 1914. (Docket No. 13.) Decided April 7, 1914.

Case by Helmer Conradsen against the Osceola Consolidated Mining Company for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed; new trial denied.

Allen F. Rees (Rees, Robinson & Petermann, of counsel), for appellant.

N. A. Ruonavaara (A. W. Kerr, of counsel), for appellee.

[1] As to servant's assumption of risk of unexpected explosion, see 19 L. R. A. (N. S.) 360.

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OSTRANDER, J. While it is alleged in the declaration that it was defendant's duty, among others, to have adopted, promulgated, and vigilantly enforced a rule for notifying miners of the condition in which the place in which they were required to work was left by miners working in the same place, on another shift, the case as made and as it was submitted to the jury, and the legal propositions presented in this court, may be gathered from that portion of the charge of the court which is here set out:

"The plaintiff has brought this suit to recover damages for personal injuries which he received while in the employ of the defendant mining company on or about the 16th day of February, 1911. He claims, and has introduced evidence tending to show: That he was working as a miner sinking a certain winze from the twenty-second level to the twenty-third level of defendant's South Kearsarge mine. That there were two shifts of men working company account and not on contract, on opposite shifts, in and about the sinking of said winze. That the plaintiff and his partner worked on one shift, and that on the other shift his opposite partners, consisting of two miners, worked in and about the work of sinking this winze downward along the vein. That, on the week when plaintiff was injured, he was working with his partner on the night shift, as I recollect the evidence. That on the preceding shift, which was the day shift, his partners on the opposite shift worked taking up a sink, as it has been called in the evidence, which is done by drilling holes in the solid ground or face of the rock at the bottom of the winze and blasting the same for the purpose of taking out a cut or taking up a sink in order to push the winze further downward. That, on the said day shift, seven holes were drilled by the opposite partners of the plaintiff, and that at the end of the shift the miners working on such shift, and who were known in the evidence as the opposite partners, blasted the seven holes. That, in and about the business of blasting holes in that mine, dynamite, fuse, and caps are used. That the fuses by which the holes are fired or exploded are usually, as in this place and at that time, cut in different lengths for the pur-

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pose of exploding the holes in succession. That the holes are then exploded or blasted by firing the fuse, which explodes a primer or cap contained in the dynamite or in one of the sticks, and is supposed to explode the charge of dynamite. That sometimes as many reports or blasts are heard as the number of holes drilled and attempted to be blasted, and sometimes a less number of reports are heard, varying from one or two to any number less than the full number of blasts or attempts at blasting holes. The plaintiff further claims, and has introduced evidence tending to show, that, when a less number of reports are heard in blasting under such conditions as existed in that winze, it was the duty of the miners so doing the blasting to so report the fact, that there were a less number of explosions or reports heard by them, to the men coming on to work on the succeeding shift, or to the shift boss, so that the latter could see that timely warning and notice thereof would be given to the succeeding shift unless such miners so doing the blasting had satisfied themselves that there were no missed holes or unexploded blast, by means of a careful inspection, investigation, or examination of the premises subsequent to the firing of the holes.

"The plaintiff claims: That, on the day shift immediately preceding the night of his injuries, his opposite partners drilled and attempted to blast seven holes in making a sink in the bottom of the winze where plaintiff was employed. That, when said blast was made, the miners who were doing the blasting heard only two reports. That such miners, after a reasonable time had expired, looked over and investigated said winze, but were not able to satisfy themselves that either there was or that there was not a missed hole; it being the claim of the defendant, however, that such miners did satisfy themselves that there were no missed holes. That thereupon it became the duty of such miners to report that fact that they heard only two reports to the plaintiff, or to the shift boss, so that it would be eventually reported to the plaintiff, who would and did come to work on the succeeding shift, of the possible existence of missed holes or unexploded powder in the bottom of that winze. That the plaintiff's partners on the other shift (that is, the miners who were doing the blasting, as

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aforesaid) failed to notify him or send him word or warning to the effect that only two explosions were heard, and that plaintiff went to his place of work without any knowledge of the existence of any unexploded dynamite in the bottom of the winze, and while exercising due and ordinary care for his own safety, and without having assumed the risk, he and his partner drilled into unexploded dynamite then and there in the bottom of the winze, which thereby caused an explosion, as a result of which the plaintiff received the injuries of which he complains in this case.

"That is substantially the claims of the plaintiff in this case. And, furthermore, the plaintiff claims: That his injuries so received are a result of negligence on the part of the men working on the opposite shift in failing to notify him that only two reports were heard, and failing to warn him of the possibility of the existence of unexploded dynamite in the winze, and that the defendant is responsible for the negligence of the miners on the opposite shift. That there was no want of ordinary care on the part of the plaintiff which contributed proximately to his injuries, and that the injuries which resulted to him were not assumed by him and were not and are not one of the inherent risks of the service which he assumed in entering upon and continuing in the employment of the defendant.

"On the other hand, the defendant claims: That there was no negligence on the part of the defendant. That the miners on the other shift satisfied themselves, from an examination and investigation of the situation in the bottom of the winze after the blasting on the day shift, that there was no missed hole or unexploded dynamite in the winze. That the inspection and investigation which they made was the usual, reasonable, and ordinary investigation that would be made under such conditions, and that by reason thereof the miners working on the day shift became perfectly satisfied that there was no missed hole in that winze or any unexploded dynamite, and that therefore there was no occasion on their part and no duty to warn the partners who would succeed them, the plaintiff and his partner, or to warn the shift boss, of the existence or possible existence of any unexploded dynamite in the bottom of the winze.

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"The defendant denies that it was the custom under the conditions which obtained in that winze, and especially in making a sink and taking up a sink, as they express it, to depend upon the number of reports to determine whether there was any unexploded dynamite left after the blasting, and that such number of blasts was no evidence either one way or the other as to what had occurred with reference to missed holes or the existence of unexploded dynamite.

"The defendant further claims that the miners, even if they did neglect their duty in this case, are fellow-servants of the plaintiff, for whose neglect they are not responsible in this case. The defendant also claims that the risks, under the circumstances of this case, of unexploded dynamite in the winze, from which the plaintiff was injured, was one of the inherent and ordinary risks of the service which he assumed and entered upon when he went into the employment of the defendant, and for which the defendant in law is not responsible. The defendant also claims that, if there was any negligence on the part of the defendant or upon the part of any one for whom the defendant is responsible, there was also negligence on the part of the plaintiff himself in not making a sufficient examination of the premises in the bottom of the winze before he went to work, in order to determine for himself whether or not there was any missed holes or unexploded dynamite in the bottom of that winze, and the defendant therefore denies any liability to the plaintiff, and claims that it should recover a verdict in this case, by reason of any and all of those claims.

"Now, you have heard, gentlemen of the jury, the claims of the parties as near as the court can recollect them, and the first question for you to determine will be whether or not there is any negligence on the part of the defendant which caused the injuries to the plaintiff in this case. Negligence is usually defined as the failure to exercise ordinary care under the circumstances. That is, the failure to exercise such a degree of care for the safety of another as a reasonably prudent person would have exercised under like conditions and circumstances.

"Now, as you have already heard, the claim of negligence made by the plaintiff in this case is that the

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defendant has failed to warn and notify the plaintiff of the existence or possible existence of missed holes or unexploded dynamite in the bottom of that winze before he went to work there on that night shift that he was injured. The plaintiff claims it was the duty of the defendant to have warned him of its existence, if you have found that it did exist, of missed holes or unexploded dynamite in the bottom of the winze; and the plaintiff claims it was the custom in that mine for men who were going to work to rely upon the opposite shift, the men who had worked upon the preceding shift, to give that warning, if the men working on the preceding shift had reasonable opportunity to become aware that missed holes or unexploded dynamite was existing, or liable to exist, in the premises where the succeeding shift was to come on to work, and that that custom was applicable to this case and to the circumstances of this case; and the plaintiff further claims that, when the number of reports were not heard equivalent to the number of holes attempted to be exploded, that was evidence from which the men doing the blasting should have determined that there was a possibility of missed holes, and the fact that a less number of explosions were heard than the number of holes attempted to be blasted should have been brought home to the knowledge of the men on the succeeding shift, and that that custom has application to the facts in this case.

"I say to you, gentlemen, if you find by a fair preponderance of the evidence that such custom existed, then it will be your duty to say that the defendant was guilty of negligence in failing to give the plaintiff warning that there was a possibility of missed holes or unexploded dynamite in that winze prior to his going to work on that night shift, and it makes no difference whether it was the duty of the men working on the preceding shift to give that warning, or the shift boss. He was not a fellow-servant of the plaintiff; he was an agent of the defendant, and for whose neglect in that regard the defendant would be liable in this case; and it will be for you to determine whether there was such a custom or not prevailing in that mine. It is denied by the defendant, and you have to find by a fair preponderance of the evidence,

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as I outlined it to you and as claimed by the plaintiff, whether it existed, and that it was applicable to the conditions pertaining in that winze. It would not make any difference whether the custom existed in other conditions in the mine, if it did not exist and was not applicable to the conditions prevailing in that winze at the time the blasting was done and at the time the plaintiff went to work succeeding the blasting on the next shift. If you find that such custom existed by a fair preponderance of the evidence, then proceed to the next step in the case. If you do not find such custom, then I charge you it is your duty to render a verdict for the defendant; you need not consider any other question in the case. If you do find that such custom existed, then you may proceed to determine whether or not, if that warning had been given, the plaintiff in this case would have been in any better position. In other words, would it have prevented the injury which occurred? Would it have prevented the explosion in the winze at that time? If you further find that, if the plaintiff had that warning and knew that there was a less number of blasts reported than had attempted to be exploded, it would have prevented his injuries, if you find that to be a fact, then, gentlemen of the jury, you can say, and it will be your duty to determine, then, as a matter of fact, that the negligence of the defendant was the proximate cause of the injury to the plaintiff; and if you have not so determined that, even had such a custom existed, it would have done the plaintiff any good had he got that notice, then you should find for the defendant."

The jury returned a verdict for plaintiff, upon which judgment was entered. Defendant at the close of plaintiff's proofs, and when all proofs were concluded, asked for a peremptory instruction in its favor. The grounds of the motion were: (1) There is no proof of the custom or duty relied on by plaintiff. There is no proof of any negligent fault or failure of the miners who worked on the opposite shift with respect to any duty or custom. (2) Assuming there was a duty resting upon the miners in the opposite

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shift and a default on their part, it was the fault of fellow-servants of plaintiff.

Errors are assigned which raise other questions, but the argument of counsel for appellant is directed principally to the propositions just stated. On the other hand, after a quotation of testimony from the record, counsel for appellee admirably and concisely state their position as follows:

"We cite this testimony merely for the purpose of showing that at least there was some evidence before the court and before the jury which tended to show that there was a custom that it was the only means of protection furnished the plaintiff or people in a like situation; that this was known, or must have been known, to the defendant; and that it was evidence upon which a jury could base its verdict, and evidence which it is the duty of the jury to pass upon under the proper instructions of the court. It cannot be brushed aside merely with the statement that there is no evidence in the case.

"There was undoubtedly some testimony in the case showing the practice or custom among the miners with regard to submitting information relative to the conditions of the missed holes, and so on. As long as the defendant required work of the extremely hazardous character of that performed by the plaintiff in this case, and did not choose to provide a system of rules and a system of inspection looking to the protection of its men, but acquiesced in the custom or practice, loose as it might be, which the men themselves had established, it is bound by that custom. It cannot, because it failed to provide a more perfect method than it had permitted the men to work out for themselves, be heard to say that they are absolved from all duty because the men did work out some system, though a crude one.

"There is hardly any ground for argument that the defendant company owed the plaintiff the duty to warn him of the latent danger in the place in which he was to work. If there had been any doubt on this ground, it was settled in the case of *Panela* v. *Castile Mining Co.*, opinion dated December 20, 1913 [177 Mich. 669]. A reading of that opinion renders the

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citation of other authorities on this proposition unnecessary.

"The appellant's second contention, viz., that the negligence in this case, if any is to be imputed to any one, was that of a fellow-servant, is completely disposed of by the case of *Panela* v. *Castile Mining Co.* The duty claimed by the plaintiff in the case at bar is exactly the duty placed upon the shift boss in the case of *Panela* v. *Castile Mining Co.*, and it is there held by the court that the duty to give this warning was the nondelegable duty of the master. * * *

"It was held in *Panela* v. *Mining Co.*, 165 Mich. 336 [130 N. W. 689], that it was the duty of the defendant to warn plaintiff if the members of another crew left explosives in the shaft. The court said:

"'All crews used explosives. It was the duty of defendant to notify plaintiff if the members of another crew left explosives in the shaft, because, if such notification was not given, there would exist an unknown, and perhaps undiscoverable, hazard to which plaintiff should not be exposed. This is the reasonable meaning.'"

We are referred by appellee also to *Shannon* v. *Mining Co.*, 24 Wash. 119 (64 Pac. 169); *McMillan* v. *Mining Co.*, 32 Wash. 579 (73 Pac. 685, 98 Am. St. Rep. 908); *Blaisdell* v. *Paper Co.*, 75 N. H. 497 (77 Atl. 485, 139 Am. St. Rep. 735); *Coffeyville, etc., Tile Co.* v. *Shanks*, 69 Kan. 306 (76 Pac. 856). The case of *Panela* v. *Mining Co.*, reported in 165 Mich. 329 (130 N. W. 686, 144 N. W. 528), is not decisive of the case at bar. The case was here first on error to review an order sustaining a demurrer to the declaration, and we found in it averments sufficient in form and substance to require the admission of testimony. In an analysis of the language employed in the declaration, the issues presented were stated. No rule of law affecting the duty of the defendant was announced, and the last sentence of the quotation from the opinion, found in appellee's brief and above set out, does not appear in the opinion. What the court said was, "This is the reasonable meaning," referring

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to the language of the declaration, and it did not say, as counsel have made it appear, "This is the general rule." Upon the second appearance of the case in this court, after a trial in the court below, where a verdict for defendant had been directed, there was presented the question whether, viewing the testimony in a light most favorable to plaintiff, there were issues of fact for a jury. A statement of facts is incorporated in the opinion, and among them the one that:

"The duty of so warning them [the men] was imposed by defendant on the foreman of each crew. It was customary to so give such warning where there were several crews working at the same place."

In other respects, the facts which in that case the testimony offered by the plaintiff tended to prove were vitally different from the testimony offered in the case at bar. And it was not decided that the master owed to the miners the nondelegable duty to warn them of unexploded dynamite left in the mine by fellow miners working on another shift. It is true that four of the justices, resting the duty upon the doctrine of the rule of safe place, were of opinion that it was nondelegable. But only four of the justices agreed to the conclusion. Nor are the other cases cited by appellee controlling here, as an examination of them will discover.

The facts shown by the record are simple, and not disputed, and, briefly stated, they are as follows: Four experienced miners were employed by defendant in sinking a winze, 4 by 4½ or 5 feet in size, in rock. Two of them worked on the day, and two on the night, shift. These men did the drilling, blasting, and cleaning out of the winze as they proceeded. They had been at the particular work for some weeks, and had proceeded more than 30 feet into the rock. Having squared up the sides and leveled the floor, the miners on the day shift had drilled in the rock 7 holes

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from 5 to 6 feet in length and an inch and a half in diameter. One of these holes was substantially in the center of a circle made by the other 6; the diameter of the circle being perhaps 14 or 15 inches. The center hole was drilled vertically into the rock, the others at an angle; the rock within the drill holes being roughly in form a cone. That is, in making the six holes, the drills were so directed as to gradually approach the center of the circle; one hole sometimes intersecting another or others. Into the seven drill holes dynamite was introduced, the fuses lighted, the men left the pit, and the action of the explosion, if the desired result was accomplished, was to break up, so that it could be removed, the rock inside the drill holes.

Thereafter drilling and blasting proceeded both from above and from the inside of the opening thus made until the rock inside the walls of the winze had been removed. In this way the process was repeated. But while seven caps and seven fuses were used, one to each drill hole, and were cut and fired in such a way as if further removed from each other, to produce a series of explosions, the charges of dynamite were so close to each other that in fact one explosion was all that sometimes could be heard, two or more at other times. The fact that a less number than seven explosions could be counted was not evidence that any charge remained unexploded. All of these miners knew this. Sometimes, and it was true on the particular occasion, the explosion will break up the rock inside the circle of drill holes, but will not lift or blow it out of the hole. It will be, and in this case it was, left, except for a few inches at the collar, or stop, so closely packed that another blast was required to loosen it. Whether, in such a case, below the surface of what remained in the hole there is unexploded dynamite may and may not be discoverable. Sometimes, perhaps most of the time, the results of a blast

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were left in the pit to be cleaned out by the men in the oncoming shift. They take conditions as they find them, with such warning as the outgoing shift may leave for them, make such examination as they choose, and go on with the work. In short, the miners are the men upon whom rests the duty to do all that is required to be done about the matter. It does not appear that more skillful inspectors can be employed. Upon the particular occasion the miners who set off the blast went back into the pit, after hearing two explosions, made an examination, satisfied themselves that all of the charges had exploded, and quit work. They were mistaken. But it does not appear that any one could have been more certain. The plaintiff and his companion, coming to work, saw the conditions. They did not know whether the other miners had been able to hear one or more explosions. They could see and understand everything else that the others could have told them. They knew how the drilling had been done; they saw the hole plugged with material; they knew what such examination as could be made disclosed. They had precisely the same information that the miners on the outgoing shift had, except the information that but two explosions had been heard. But that information, as has been stated, would not be evidence that all of the charges had, or that they had not, been exploded. And it was a part of plaintiff's knowledge, derived from his experience, that it was unlikely that there had been seven or any considerable number of explosions. It is not perceived how anything that defendant or the miners on the preceding shift could have told plaintiff would have improved his situation. What those miners saw, he could see. Such inspection as they might have made, he could make.

It does not appear that the method of excavating rock pursued was not an approved and wholly proper

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method. Unless, then, we are to hold, as matter of law, that the defendant owed to plaintiff the duty to discover and notify him that there was unexploded dynamite in this rock, there is no evidence of any negligence on the part of defendant or on the part of the miners who did the blasting. We find neither authority nor reason for such a ruling. We may go further and say there is in this record no evidence of a custom of miners to notify other miners of the possible existence of unexploded dynamite where work such as plaintiff was doing is carried on. At best, the evidence is that, when the miners who set off the blast discovered or believed such a condition existed, they were in the habit of giving notice of it. Where mining for ore was carried on, and holes for dynamite were drilled at various distances from each other from a foot and a half to greater distances, a series of explosions was expected, and miners were able to count them, and thus learn whether all of the charges had been exploded. We are not here dealing with such a case.

The judgment is reversed, and, as it does not appear that any rule which defendant could formulate and enforce would have better protected plaintiff under the circumstances, no new trial will be granted.

MCALVAY, C. J., and BROOKE, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

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RAYNER *v.* SLIGH FURNITURE CO.

1. APPEAL AND ERROR—CERTIORARI—INDUSTRIAL ACCIDENT BOARD—CONTRIBUTORY NEGLIGENCE—PERSONAL INJURIES—MASTER AND SERVANT.

   In reviewing a decision of the industrial accident board, awarding compensation for the accidental injury and resulting death of an employee, a finding that the injury did not arise from the intentional and wilful misconduct of the deceased will not be reviewed, if there was evidence to support it. Act No. 10, Extra Session 1912, § 12, pt. 3 (2 How. Stat. [2d Ed.] § 3980).

2. MASTER AND SERVANT — INDUSTRIAL ACCIDENT BOARD — COURSE OF EMPLOYMENT.

   Injuries resulting in the death of an employee, in the factory of defendant, from colliding with another servant while the decedent was running to punch the time clock, a duty imposed by the master, was an industrial accident, within the meaning of Act No. 10, Extra Session 1912 (2 How. Stat. [2d Ed.] § 3939 *et seq.*). MCALVAY, C. J., dissenting.

3. SAME—PROXIMATE CAUSE.

   If not the proximate cause of decedent's injuries, the performance of such duty so contributed to the accident as to constitute a concurring cause.

Certiorari to the industrial accident board by the Sligh Furniture Company to review an order awarding compensation to Lida Rayner for the accidental death of her husband, Adelbert Rayner. Submitted January 8, 1914. (Docket No. 26.) Affirmed April 7, 1914.

Francis D. Campau (William A. Mulhern, of counsel), for appellant.

Norris, McPherson & Harrington, for appellee.

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KUHN, J. This case is brought here by certiorari to the industrial accident board. Adelbert Rayner, the applicant's husband, was injured while in respondent's factory in the city of Grand Rapids. About 100 carvers and cabinet workers were employed on the third floor of the factory, and, on the blowing of the noon whistle, each workman was required to proceed to the end of the room and punch the time clock before leaving for dinner. Mr. Rayner, who was working on this floor, about 150 feet from the time clock, on November 5, 1912, when the whistle blew at noon, started on a run from his bench to the clock to punch it. After proceeding about 30 feet, he collided with Martin De Vos, a fellow employee, whom he could not see because of drawers which were piled up on the floor. This resulted in Rayner fracturing or injuring one or more of his ribs. The injury to his side and ribs affected the pleura of his lungs, and from the inflammation or irritation which followed the lungs became affected, resulting in Mr. Rayner's death.

There had been no general notice printed or posted of a rule against running to the time clock, but, about a year previous to the accident, Rayner had been told by his foreman, Hicks, not to run to the clock. There was testimony that the rule against running had not been enforced, and no employee had been discharged because of doing so. An award to claimant, who was left as his dependent, was made by a committee on arbitration, and upon review was affirmed by the industrial accident board.

It is the contention of the respondent and appellant that the facts indicate that the accident and the resulting injury arose out of an act independent of the employment, in direct violation of a rule of the company, and solely for his own pleasure or convenience. With reference to the rule, the commission made a

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finding that such a rule had not been enforced, and its general violation had been acquiesced in by the employer. There being evidence to support this finding of fact, by the terms of the act (part 3, § 12, Act No. 10, Public Acts, Extra Session 1912)[1] it becomes conclusive, and as a result eliminates the consideration of the question as to whether the injury arose by reason of the intentional and willful misconduct of Rayner. *Rumboll* v. *Colliery Co.*, 80 L. T. 42, 1 W. C. C. 28.

At the time of the accident, Rayner was in the performance of a duty imposed upon him by his employer. When the noon whistle blew, it was obligatory upon him, before leaving the place of his employment, to punch the time clock. The performance of this duty, if not the proximate cause, was a concurring cause of his injury. In *Fitzgerald* v. *Clarke & Son* (1908), 99 L. T. 101, 1 B. W. C. C. 197, Buckley, L. J., stated the rule as follows:

"The words 'out of and in the course of the employment' are used conjunctively, not disjunctively; and upon ordinary principles of construction are not to be read as meaning 'out of,' that is to say, 'in the course of.' The former words must mean something different from the latter words. The workman must satisfy both the one and the other. The words 'out of' point, I think, to the origin or cause of the accident; the words 'in the course of' to the time, place, and circumstances under which the accident takes place. The former words are descriptive of the character or quality of the accident. The latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by the words 'out of' involves, I think, the idea that the accident is in some sense due to the employment."

We are well satisfied that the accident was an industrial accident within the meaning of the compen-

[1] 2 How. Stat. [2d Ed.] § 3939 *et seq.*

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sation act, and arose "out of and in the course of his employment." *Whitehead* v. *Reader*, 2 K. B. 48 (1901).

The judgment and decision of the industrial accident board is affirmed, with costs against appellant.

BROOKE, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred with KUHN, J.

MCALVAY, C. J. I do not think that this was an industrial accident within the statute.

CITY OF ADRIAN v. WHITNEY CENTRAL NATIONAL BANK.

1. BILLS AND NOTES—TITLE—BONA FIDES—NEGOTIABILITY.
   A purchaser in good faith acquires valid title to negotiable bonds payable to bearer, although they may have been stolen by the prior holder.

2. SAME—EVIDENCE—BURDEN OF PROOF.
   Such holder has the burden of proving that he is a holder in due course, within the meaning of the negotiable instruments law. Act No. 265, Pub. Acts 1905 (2 How. Stat. [2d Ed.] § 2672 *et seq.*).

3. SAME.
   Where defendant bank made a loan to the manager of a hotel on the security of two municipal sewer bonds, payable to bearer, and the bank ascertained before taking the pledge that he was in fact manager of the hotel, but had no notice that his title was bad or the bonds had been stolen by him, it was a bona fide purchaser and acquired the title as against the owner who had intrusted the securities to him for safe keeping while living as a guest at the hotel.

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Appeal from Lenawee; O'Mealey, J. Submitted January 9, 1914. (Docket No. 35.) Decided April 7, 1914.

Bill by the city of Adrian against the Whitney Central National Bank and Anna M. Weiss for an order of interpleader. From a decree for defendant bank, the other defendant appeals. Affirmed.

Baldwin & Alexander, for appellant.

D. B. Morgan, for appellee Whitney Central National Bank.

STEERE, J. In this case Anna M. Weiss has appealed from a decree of the circuit court of Lenawee county, rendered on a bill of interpleader filed by the city of Adrian, for the purpose of protecting itself against conflicting claims of defendants, and to have determined which of them is entitled to receive the principal and interest due and to fall due on two sewer bonds for $1,000 each, issued by said city of Adrian on November 1, 1906, to bearer, and payable on the 1st day of November, 1923, with interest at the rate of 4 per cent. per annum, payable semi-annually.

The two bonds in question, numbered 99 and 100, were, at the time of issuing the series to which they belonged, purchased by Frank X. Weiss, since deceased, and by the terms of his will became the property of defendant Anna M. Weiss, his daughter-in-law. The bonds of that issue were in short and simple form, appropriate for sale to the general public; the portion material here being as follows:

"The city of Adrian, a municipal corporation, hereby promises and agrees to pay to bearer the sum of one thousand dollars, together with interest thereon at the rate of four per cent. per annum as evidenced by the annexed interest coupons.

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"This bond is one of a series of seventy-five thousand ($75,000) dollars bonds for public sewer purposes, said bonds being numbered from 1 to 124 inclusive.

"The same is due and payable at the city treasurer's office of the city of Adrian on the 1st day of November, 1923.

"Pay to the bearer the amount of each of the interest coupons hereto attached, as the same shall severally become due."

On November 1, 1910, the Whitney Central National Bank, of New Orleans, La., presented the coupons then due upon the two bonds in question to the Adrian city treasurer for payment, making claim that it was the lawful holder, in due course, of said bonds and coupons. Previous to this, the city treasurer had received two letters from defendant Anna M. Wiess claiming said bonds had been stolen from her, and requesting that, if any one presented them for payment, they should be taken up, and the party presenting them arrested.

Payment being refused, the Whitney Central National Bank commenced an action at law against the city of Adrian in the circuit court of Lenawee county to recover the amount due on the two coupons, which had become due and payable. Complainant, declaring itself ready and willing to pay the amount due on said bonds to the proper parties, filed this bill, asking the aid of the court to determine who is entitled to demand and receive payment, and that in the meantime an injunction issue restraining further prosecution of said suit instituted against it to recover the amount of said coupons. Both defendants answered.

The Whitney Central National Bank claimed to have become the holder of said bonds and coupons in due course of business, in good faith, for value, without any notice of infirmity or defect of title in the party negotiating the same; said party being one E. C. Gray, the apparent owner, who presented said

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bonds at the banking office of defendant, in the city of New Orleans, on August 6, 1910, claiming to be the owner, and there negotiated and delivered them to said bank, as collateral to secure certain notes given for loans made to him, which loans have not been paid.

Defendant Anna M. Weiss, answering, claimed that the bonds belonged to her, and were taken from the safe of a hotel in New Orleans at which she was a guest, without any authority from her and under such circumstances as to make the taking larceny; that she was subsequently informed the clerk or manager of said hotel took them from the safe and "put them up with the Whitney Central National Bank as collateral to his note for a loan to pay a gambling debt to one of the officers of said bank." She also requested in her answer that the issue be tried by jury. A jury was called, but, it being subsequently agreed between counsel that the case should be heard and determined by the court, the services of the jury were dispensed with.

The testimony shows that E. C. Gray, who negotiated the bonds with defendant bank, was then manager of the De Soto Hotel in New Orleans, having assumed that position some time in June, 1910, going there from Detroit, where he had held a position in the Detroit Club. Defendant Anna M. Weiss was a resident of the city of Adrian, and quite intimately acquainted with him. She testified that she had known him for about a year before he went to New Orleans, and had joined him at the De Soto Hotel under a previous arrangement that she was to go down there and have a position as cashier; that there was an understanding between them they might some time be married, although she knew he had a wife and child living in Detroit, but he had assured her he would get a divorce from his wife; that she took her

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private papers with her, including the bonds in question, and, on her arrival in New Orleans, she was met at the station by Gray, who took her to the De Soto Hotel, where he registered her under the name of Mrs. Du Bois, of Chicago, introducing her as his niece; that, while in New Orleans, she went by that name at his request, and they occupied adjacent rooms in the hotel, with a door between; that he told her there was a safety deposit vault in the hotel for guests to put their valuables and papers in, and she should put hers there; that she gave them to him for that purpose, and he put them in the safe; that she had confidence in him at that time and paid very little attention to it; that she never was employed in the hotel, but remained as a guest as long as Gray was there. It was while they were living at the De Soto Hotel that Gray negotiated the bonds with the Whitney Central National Bank.

As to the circumstances of the negotiation, it appears undisputed that on the 6th of August, 1910, Gray applied at the bank to negotiate a loan of $750, stating that he was manager of the De Soto Hotel in that city, and would give as collateral for the loan the bonds in question, which he produced. He further stated that he was related to a Mr. Smith, assistant to the president of the First National Bank of Detroit, Mich., that these bonds represented money which he had saved in the past, and, having temporary need of money, he desired to borrow, using the bonds as collateral. After examining the bonds and discussing the matter with him, the president of the bank telephoned the De Soto Hotel and ascertained that Gray was manager there, as he had represented. Relying upon the information thus obtained, believing Gray's statements, and knowing that bonds of this character were sought after and considered desirable, as they were payable to bearer, and there were no suspicious

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circumstances in connection with the offer, the bank made the loan of $750 to Gray, taking one of the bonds as collateral security. Gray deposited the money in the bank, and checked it out from time to time. On the 27th of August, 1910, he applied to the bank for a further loan of $500, offering as security the other bond. No suspicious circumstances having arisen in the meantime, the loan was made; the money being deposited and checked out as before. On September 10, 1910, he borrowed $250 more on his note, secured by the second bond which the bank held. This loan was negotiated with the vice president of the bank, who, since the other loans were made, had returned from abroad, and was living at the De Soto Hotel, thus becoming acquainted with Gray as its manager. He testified Gray impressed him favorably, and, so far as he could judge by seeing him around the hotel, his habits were correct, and he knew nothing to the contrary until after Gray had left the city. The notes Gray gave were what are generally known as collateral notes, pledging the bonds attached as security, with authority to sell in case of default, covering any and all indebtedness which he might owe to the bank, and all costs which might be incurred in connection therewith.

On the 8th of October, 1910, Gray presented to the Whitney Central National Bank a check drawn on Adrian State Savings Bank for $300, payable to bearer, and purporting to be signed by Anna Weiss. He indorsed this check, and the bank cashed it for him. The bank then forwarded the same through the usual channels to the Adrian State Savings Bank for collection, and payment was refused because the genuineness of her signature was questioned.

All officers of the bank who had anything to do with making these loans testified that they never heard or had any intimation of Gray's gambling or of any-

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thing wrong in relation to him or any question as to his ownership of the bonds until after payment of the $300 was refused. About this time Gray lost his position at the De Soto Hotel and left New Orleans, going to Covington, La., where he assured defendant Anna Weiss that he expected to get a position. She joined him there, and they stopped for some time at the Southern Hotel in that city. She testified she remained there a month or a little more; that one day he informed her he had a position as manager or assistant manager of the Battle Hotel, Mobile, and departed for that city, stating that he would get her a position in the hotel at Mobile and send for her, when she should come on and bring his trunk which he had left with her. While she was waiting at Covington, the trouble arose over nonpayment at Adrian of the $300 check purporting to be signed by her, which Gray had negotiated with the Whitney Central National Bank. It was in that connection she first discovered, as she states, that the bonds were not among her papers, which she had taken with her when she left the De Soto Hotel, and she then notified the city treasurer of Adrian that the same had been stolen. It was her testimony that she never authorized Gray to hypothecate these bonds or to sign any check for her; that she had confidence in him and believed him honest until after the matter of the $300 check came up and she went back to New Orleans, when she first learned from the bank officials that Gray was a gambler, and the full measure of his perfidy. Of her final disillusioning she testifies: "Gray had turned against me, and his wife was there, and I was all alone."

If, at the time Gray hypothecated the bonds which she had put into his hands, she, with her intimate acquaintance and knowledge of him, believed him honest and trusted him implicitly, as she states, she is, at least, at a disadvantage in urging that the bank

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was not an innocent party and acted in bad faith when accepting the bonds, payable to bearer only, presented by him under the circumstances shown, as security for a loan.

Several bank officials of Adrian testified in behalf of defendant Weiss as expert witnesses to the effect that custom and good usage in the banking business demanded greater precautions than those shown to have been taken by the defendant bank; the contention upon that proposition being stated in her counsel's brief as follows:

"We have shown by the testimony that in the usual and ordinary course of banking business, that the appearance of a stranger in a bank with bonds such as these bonds was a circumstance in itself which has come to be recognized by bankers as a danger signal, and that good bankers in due course do not purchase or loan money to strangers upon bonds of which they have no knowledge, either as to the title or as to the value."

In support of which is cited *Smith* v. *Mechanics' & Traders' Bank*, 6 La. Ann. 610. The facts in that case are not in harmony with those under consideration. There the plaintiff, a broker, discounted, without inquiry, for an entire stranger a forged bill purporting to be drawn on and accepted by a commercial house of New Orleans, and gave a check on the defendant bank payable to the order of the supposed acceptors of the bill. The broker, the bank, and the commercial house were all located in the city of New Orleans. It was held the plaintiff did not exercise due caution in taking the bill from a stranger without inquiry, and that making out his own check to the order of the supposed acceptors of the bill instead of the party to whom the bill was discounted was not in the usual course of business. Here the party presenting the bonds was ascertained to be a resident of the city, occupying a responsible business position. He

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produced the bonds, payable to bearer, with no other payee named, and was presumptively the owner of them; no indorsement or signature being required to transfer title. In *Consolidated Ass'n of Planters* v. *Numa Avegno*, 28 La. Ann. 552, the attitude of that court in a case more closely analogous to this is shown. It is there held that bonds, with coupons attached, payable to bearer are negotiable securities, having all the qualities of commercial paper, and pass as such by delivery. That, though stolen from a bank by burglars, the purchaser, acquiring them in good faith, before maturity, for value, in due course of business, is unaffected by want of title in the vendor. In *Wylie* v. *Railway Co.* (C. C.), 41 Fed. 623, it was said of stolen bonds:

"The bonds being negotiable, the promise to pay runs to the holder, and, if he has acquired them bona fide and for value, the plaintiff's title is gone, and the promise is satisfied by the payment to the holder according to their tenor."

The law is well settled by abundant authority that a purchaser of stolen negotiable bonds before maturity, without fraud or bad faith, obtains good title thereto. *Welch* v. *Sage*, 47 N. Y. 143 (7 Am. Rep. 423); *Seybel* v. *National Currency Bank*, 54 N. Y. 288 (13 Am. Rep. 583); *Evertson* v. *National Bank*, 66 N. Y. 14 (23 Am. Rep. 9).

The cardinal principles upon this subject have been condensed and crystallized into statute law in many States by the uniform negotiable instrument act. This has been enacted in both Michigan (Act No. 265, Pub. Acts 1905, 2 How. Stat. [2d Ed.] § 2672) and Louisiana (Gen. Assem. Acts 1904, No. 64). The rights of the contesting parties here are to be determined by the provisions of this statute, which, however, this court has held, introduced no change in the rules relative to a holder in due course. *Graham* v. *Smith*, 155 Mich. 65 (118 N. W. 726).

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It must be taken as undisputed that, though Gray came lawfully into possession of these bonds, he did not have title to them. On their face they were regular and complete, payable to bearer only, were negotiated and delivered by him under claim of ownership to the defendant bank, before maturity, for value, with no notice that they had been previously dishonored, or that there was any infirmity or defect in his title to them.

It is claimed in behalf of defendant Anna Weiss that the bank failed to prove that it was "a holder in due course;" it having the burden of proof on that question under section 61 of said negotiable instrument act, which provides as follows:

"Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course."

Section 54 of said act provides:

"A holder in due course is a holder who has taken the instrument under the following conditions: *First*, that it is complete and regular upon its face; *second*, that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; *third*, that he took it in good faith and for value; *fourth*, that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

Section 58 provides:

"To constitute notice of an infirmity in the instrument, or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

The numerous authorities upon a holder in due

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course are found on pages 309 and 310 of Ogden on Negotiable Instruments, and it would be superfluous to review them here.

In Jones on Corporate Bonds and Mortgages (2d Ed.), § 200, using the following language, quoted with approval by this court in *Toledo, etc., R. Co.* v. *Peters*, 177 Mich. 76 (143 N. W. 18), it is said:

"A purchaser may have had suspicion of a defect of title, or knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or he may have disregarded notices of stolen bonds; and yet, if he has purchased for value in good faith, his title cannot be impeached."

In this case the evidence is conclusive that the bank officials had no such suspicion, knowledge, or notice at the time the bonds in question were negotiated.

Testing the obligations, duties, and risks of the defendant bank by the statute and authorities cited, in the light of the facts and circumstances proven, we are constrained to hold that it is shown to have acted without bad faith, and to be the holder of said bonds "in due course."

The result reached by the learned circuit judge is well supported by reason and authority, and his decree is affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, and MOORE, JJ., concurred. BIRD, J., did not sit.

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VERIDEN *v.* McLEOD.

1. CONSPIRACY—ELECTIONS—ILLEGAL COUNT—PUBLIC OFFICERS.
   A declaration averring that plaintiff, a saloonkeeper, became a candidate for election as a trustee of the village of Grosse Pointe Shores, that the defendants were the village council and were inspectors of election, that defendants did not want a saloonkeeper upon the board and conspired together to deprive him of the election, that they counted the votes dishonestly, and although plaintiff was elected by a plurality of two votes they declared his opponent elected to the office, that one of the defendants pushed a ballot cast for the plaintiff into the box with the point of a pencil and thereby placed a distinguishing mark upon it, that the defendants failed to seal the ballot boxes as required by law and refused to recount them on petition of the defeated candidate because the boxes were not locked and sealed, sufficiently alleged facts constituting a cause of action.

2. SAME—DEFINITION—COMBINATION.
   A conspiracy is a combination of two or more persons by some concerted action to accomplish a criminal or unlawful purpose, or to accomplish a purpose not unlawful by criminal or illegal means.

3. SAME.
   Where the evidence did not establish a joint assent of the minds of two or more defendants to effect the unlawful purpose of keeping plaintiff out of office as village trustee it was insufficient to sustain a verdict.

Error to Wayne; Mandell, J. Submitted January 16, 1914. (Docket No. 105.) Decided April 7, 1914.

Case by Frank S. Veriden against Alexander I. McLeod and others for conspiracy to deprive plaintiff of a public office. Judgment for defendants, on a verdict directed by the court. Plaintiff brings error. Affirmed.

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James H. Pound, for appellant.

William M. Mertz and *Frank N. Renaud,* for appellees.

MOORE, J. This case was commenced by declaration, the material parts of which are as follows:

"Frank J. Veriden, plaintiff in this suit, by James H. Pound, his attorney, comes into this court and complains of Alexander I. McLeod, Abner Larned, George Osius, Julius Hagar, William E. Roney, and Louis J. Girardin, defendants herein, in an action of trespass on the case, for that whereas, the defendants and this plaintiff are all residents of the village of Grosse Pointe Shores, * * * and are all citizens thereof, and the defendants are its village council, also were the inspectors of election at the village election, on the 8th day of April, 1912. * * * And whereas, plaintiff is a dealer in a legal business authorized to do business in the county of Wayne, * * * the defendants did, plaintiff avers, enter into a certain illegal, corrupt, and unlawful act, and series of acts and conspiracies, not only to deprive this plaintiff from carrying on his legal business, but plaintiff avers that he being in fact legally and lawfully nominated as a village trustee of said village of Grosse Pointe Shores, and striving for the said office, and the said defendants, and each of them, not wanting a saloonkeeper upon the board of village trustees, resolved to wrongfully keep him (plaintiff) from out thereof. * * * And plaintiff avers that defendants successfully did so keep him (plaintiff) out of said office of village trustee by the following unlawful, illegal, and wrongful acts: * * * They (the defendants) * * * wrongfully violated their oaths, and tricked plaintiff out of a recount, and out of the office of village trustee, to which he avers that he was legally elected, to wit, the village trustee of the village of Grosse Pointe Shores, in the manner following, amongst others: They did not honestly count the ballots cast at said election, except the first time, when plaintiff was elected by a plurality of two votes, but purposely counted them dishonestly, and pulled and hauled and marked them at different times during the

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day, and counted plaintiff out of his honestly elected office of village trustee. By also deliberately not counting for this plaintiff ballots which were cast for him, and counting against him ballots that had been cast in his (plaintiff's) favor by which wicked, cruel, wanton, and crafty acts upon defendants' part, and particularly the action of defendant Alexander I. McLeod in pushing plaintiff's employee's ballot into the ballot box with a sharp-pointed lead pencil, point downward, plaintiff was deprived of several ballots by claimed distinguishing marks. Also in permitting the defendant William E. Roney, although disqualified to act upon said board of election inspectors, to act as their clerk. By all of which means this plaintiff avers that the defendants, and each of them, wholly deprived plaintiff of the office of village trustee of the village of Grosse Pointe Shores for a period of two years from a certain date, to wit, April 8, 1912. And plaintiff avers that, the said inspectors having canvassed the said vote at the spring election of the village of Grosse Pointe Shores, it then and there became and was their legal duty, as election inspectors and officers, to seal the said election boxes in the manner and form prescribed by law, and to lock them and care for them in a certain manner prescribed by the statutes of the State of Michigan, which course of procedure prescribed by law plaintiff avers that the defendants, to conceal their crime, they (the defendants) conspired one with the other not to do. And in pursuance of such criminal agreement did not in fact do. And plaintiff avers that he, in due form of law, demanded a recount and paid his money therefor, to wit, $10, and that, after divers days had been set for a hearing, plaintiff forced a hearing, when, lo and behold, the defendants, to whom the matter of a recount had been referred by the village council of Grosse Pointe Shores, as well as by the statutes of his State, these men (the defendants), who had violated the law, and who were criminals, refused to open the boxes and recount the ballots for the reason that they themselves, and each of them, had with criminal intent themselves disobeyed the law, and used that as a fulcrum to deny to this plaintiff a recount, for the reason that they (the defendants) had not properly locked and sealed the election box or had it

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cared for thereafter. That this plaintiff avers it to be true that the integrity of this country depends upon an honest count, of an honestly cast ballot. That this homely maxim has become honored in its breach rather than in its observance in Michigan. And that, to wit, on a certain day, namely, April 10, 1912, defendants, and each of them, did advisedly nullify an election, disobey a statute of this State, and commit treason to this State, by robbing the electorate of the village of Grosse Point Shores of the fruitage of a regular village election held in the village of Grosse Pointe Shores, on a certain day, to wit, April 8, 1912; they (the defendants), and each of them, thereby depriving this plaintiff of the office of village trustee for the ensuing two years from a certain date, to wit, April 8, 1912, and of all the honors, profits, and emoluments arising by or therefrom, by denying to him (plaintiff) an honest count of said election ballots in the first instance, and a recount and an honest certification of the ballots cast at said election.

"And plaintiff avers that the defendants to the plaintiff then and there other wrongs and injuries did, to plaintiff's damage of $5,000, and therefore he brings this his suit."

The defendants pleaded the general issue.

When the case came on to be heard, counsel for defendant objected to any testimony being received for several reasons, among them:

"The more specific reasons that we base our objection to receiving testimony in this case are, as a matter of law, the plaintiff in this case was not shorn of his office, nor was he shorn of his * * * remedy by a count, or by recount having been denied. That this is a collateral proceeding, and an election cannot be inquired into in a collateral proceeding, whereas it could have been inquired into in a proper proceeding at that time, namely, *quo warranto* proceedings."

The objection was overruled, and nine witnesses were sworn on the part of the plaintiff. The petition of plaintiff for a recount was introduced in evidence. The record of the election proceedings was also produced, and Mr. Pound read into the record, "Moved

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that two doubtful ballots be rejected." The record book was received in evidence, but is not made a part of the bill of exceptions. After the plaintiff rested, the court directed a verdict in favor of defendants, because plaintiff had failed to make a case. The suit is brought here by writ of error.

It is so difficult to state clearly the contention of counsel for appellant that it may be well to quote from his briefs.

The following appears in his original brief:

"Plaintiff is an American citizen, a native of the township of Grosse Pointe, in the county of Wayne, and a resident of the village of Grosse Pointe Shores. He was regularly nominated, and was a candidate for the office of trustee of the village of Grosse Pointe Shores, located in the counties of Wayne and Macomb, facing upon Lake St. Clair, at the village of St. Clair Heights charter election, in the year 1912. The defendants were the board of election inspectors and its clerks. The election inspectors being Alex. I. McLeod, Abner E. Larned, George Osius, and Julius Hagar. The clerks being Louis J. Girardin and William E. Roney. The last named, who was instructor as to ballots, assistant clerk, and general assistant at all points of the election, who succeeded in getting himself counted into office, when he was fairly beaten in spite of all his efforts by a majority of three in the plaintiff's favor. To do this, defendant McLeod put a distinguishing mark upon the ballot of Louis Devroy. By refusing to count a ballot for Mr. Veriden, which was plainly his, and by some other wrongful actions, which are not made clear, but Veriden's majority was not shown to have been overcome, except by an unjustifiable announcement. Plaintiff legally and properly demands a recount, which the law expressly gives him, and it is seemingly acceded to, when lo, these wrongdoers refuse to grant it, because they themselves had disobeyed the law in not sealing the locked box. Not having any sealing wax, I suppose. * * * The plaintiff has a case for the jury, not only against all the defendants, but against Alex. I. McLeod, for two different torts committed by himself upon this

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record, without remonstrance from the other codefendants. * * * There is abundant circumstantial evidence in this case to warrant the submission to the jury of the question whether defendants did not conspire together to wrongfully, illegally, and criminally deprive plaintiff of the office to which he was duly elected by his fellow villagers, and to rob him (plaintiff) of his office. The defendants being for this purpose a band of election manipulators in the strongest sense of the term. I therefore, as a debt due to the laws of the State of Michigan, insist upon the reversal of this case, with costs in plaintiff's favor, that the law may rule, which, for some inexplicable reason, it is contended, it has not done so far in this case."

The following appears in the supplemental brief:

"Had there been a recount, I concede that for all I know there might have been no further trouble. There certainly would not, had Mr. Veriden not appeared to have a clear majority of the ballots, or had it been explained to him how his 47 votes legally shrunk to less than 44. Mr. Veriden wants no election he is not honestly entitled to. He is no ballot box manipulator, nor will he countenance any irregular action by others in his behalf. All he desired was a daylight count. He was entitled to it. Did he get it? No. And that, too, by reason of the confessed action of the defendants in not sealing the ballot box. And the worst part of the matter is that they (the defendants) had the physical power to open the box. It was in their possession. Plaintiff asking his rights under the statute. They or one of their number had the key. And the plaintiff was still insisting on the recount. He would not object, and could not be heard to complain, if the recount had been had, being done at his own demand and solicitation. But defendants would not give it. Why? Because they themselves had not done their ministerial duty in sealing the ballot box is the sole reason given for the refusal, and that objection is waived by the party most in interest. The one who has been dispossessed of his office, and upon whose objection? Why that of the person who promoted this violation of legal duty. The man who has gotten the office. What a shame! And then to

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say that we have no remedy for such an action. It is a reflection on the law itself, I submit. I deny that I have changed my position, which I have occupied in this case from the first. I do maintain that, plaintiff having attempted to follow the remedy provided for him by the law, and having been prevented from obtaining the relief the law gave him by reason of the wrongful acts of omission in the not sealing of the ballot box by the inspectors of election, and of commission by marking and not counting the ballots, and the whole board by not counting those ballots which were cast for plaintiff, plaintiff has a cause of action against them for such damages as a jury may deem the honor of the office to be worth, as well as the inconvenience put upon the plaintiff by defendants' actions, together with at least nominal damages for the wrong itself. Counsel cannot, or perhaps will not, understand me. I ask no court to put the plaintiff into the office of village trustee of Grosse Pointe Shores which he might be ousted from, by a hostile board of trustees, in the village of Grosse Pointe Shores at any time immediately after the roll call. Plaintiff was, if elected, entitled to the certificate of election, to show that fact, viz., that he had been elected to this responsible office. The law of this State guaranteed to him a recount, if he made a proper demand and deposited his money, which he concededly did. This he did not get, through defendants' wrongful actions. And I do claim that I have a right in this case, as the counsel for the plaintiff, to show the true facts as I might in any other action of tort. That I may show all the defendants did, or any of them did, to plaintiff's injury, and to recover such damages therefor as may be deemed by them to be just, under the evidence, offered against the defendants, or any of them rendering them liable in this case. * * * No person is trying to hold election inspectors liable for every irregularity, but when they by their act deny a candidate for office a right the legislature and governor of our State has given them, making it into a law, then there certainly should be a recovery. And if the inspectors were like the one who was sworn, Mr. Harger, the less the State have of such men the better."

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It is also claimed the court improperly excluded testimony.

The defendants again urge that plaintiff is not pursuing his proper remedy, citing a great many authorities to be found in their brief. They also urge that the trial judge made a right disposition of the case.

We think it, upon this record, unnecessary to consider whether plaintiff is pursuing the proper remedy. A perusal of the record shows a willingness upon the part of the trial court to try the case upon the merits and to let in all the testimony except that which he thought was hearsay. It is possible that it might have been well to permit an answer to several questions, of which the following is an example:

"*Q.* Did you hear the announcement made by the clerk?

"*A.* I heard it. But I could not say how.

"*Q.* You heard an announcement?

"*A.* Yes, sir.

"*Q.* Do you recollect from the announcement that you heard read by the clerk. Do you know whether —do you know from that who the three were that were elected? (Objected to.)

"*The Court:* I will exclude it.

"*Mr. Pound:* Note an exception.

"*Mr. Pound:* I am only asking for what the clerk read off.

"*The Court:* That will be excluded."

Evidently the court thought, if the witness did not know how he heard the announcement which the clerk made, that it would be hearsay, and that he also thought that, if the clerk read from something, the paper from which he read would be the best evidence of what he read, because the court repeatedly ruled that what was done by the board might be shown.

Plaintiff was permitted to show, and did show, that as the result of the first count of the ballots it was announced that Mr. Veriden received 47 votes and Mr. Roney 44; that Mr. Roney requested that the votes

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be counted again; and that they were counted at least once more, when it was announced that Mr. Roney received more votes, the number being stated, than Mr. Veriden and was declared elected.

Giving the testimony the most favorable construction possible for the plaintiff, it shows that, when one of the ballots was received and put in the ballot box, Mr. McLeod pushed it in with the sharpened end of a lead pencil; that, when the votes were counted, what we have above recited occurred; and one of the witnesses, who testified he was 10 or 15 feet away when it occurred, says the ballot which was pushed into the box with the pencil was rejected. The record also shows that plaintiff demanded a recount in due form and that a day was set for the hearing; that the plaintiff, Mr. Roney, and Mr. Jewett each appeared before the board with their respective attorneys; that Mr. McLeod moved to proceed with the recount, when objection was made by the attorneys for Mr. Roney and Mr. Jewett to a recount because the ballot boxes had not been sealed as the law required them to be sealed. The record also shows that plaintiff's counsel and the counsel for Mr. Roney and Mr. Jewett were heard at length, and that, after hearing them, the board decided not to make the recount.

We have already quoted at length from the declaration, and, as we understand it, the defendants are charged therein with a conspiracy by means of illegally rejecting ballots, and by illegally refusing a recount, to deprive plaintiff of an office to which he was legally elected, which conspiracy it is averred was carried out. This is a very grave charge and requires proof of a substantial nature to substantiate it.

There are many attempts to define the word "conspiracy" in 2 Words and Phrases. We quote one of them:

"The most satisfactory definition of 'conspiracy' to

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be found in any of the adjudicated cases is perhaps that given by Shaw, J., in *Commonwealth* v. *Hunt*, 45 Mass. (4 Metc.) 111 (38 Am. Dec. 346), in which he says:

"'Without attempting to review and reconcile all the cases, we are of the opinion that as a general description, though perhaps not a precise or accurate definition, a conspiracy must be a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal, by criminal or unlawful means. We use the terms "criminal" or "unlawful" because it is manifest that many acts are unlawful which are not punishable by indictment or other public prosecution, and yet there is no doubt, we think, that a combination by numbers to do them would be an unlawful conspiracy, and punishable by indictment.'

"He further adds:

"'But yet it is clear that it is not every combination to do unlawful acts to the prejudice of another which is punishable as conspiracy.' *Hart* v. *Hicks*, 129 Mo. 99, 105, 318 (31 S. W. 351, 352)."

"Conspiracies are of two kinds: (1) Against the public, or such as endanger the public health, violate public morals, insult public justice, destroy the public peace, or affect public trade; (2) against individuals, such as have a tendency to injure them, in their persons, reputation, or property. *Clinton* v. *Estes*, 20 Ark. 216, 224."

"The essentials of a conspiracy are: (1) A combining of two or more minds; (2) the purpose of the combining. *Commonwealth* v. *Grinstead*, 108 Ky. 59 (55 S. W. 720, 725 [57 S. W. 471])."

It is also said at page 1458, *Id.:*

"In order to establish a conspiracy, evidence must be produced from which a jury may reasonably infer the joint assent of the minds of two or more persons to the prosecution of the unlawful enterprise. *Drake* v. *Stewart* (U. S.), 76 Fed. 140, 142, 22 C. C. A. 104."

Giving every reasonable inference to what was shown or what was proposed to be shown by plaintiff,

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we think it falls far short of showing concerted action on the part of any of the defendants to do plaintiff any wrong.

Judgment is affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

VAN HAAREN *v.* TIERNEY.

ESTATES OF DECEDENTS—CLAIMS—EXECUTORS AND ADMINISTRATORS—TIME TO PRESENT CLAIMS—EQUITY.

No remedy in equity exists in favor of an infant claimant who failed to present her claim against an estate of a decedent before the time for presenting claims had expired under section 9380, 3 Comp. Laws (4 How. Stat. [2d Ed.] § 11091), in the absence of mistake, ignorance, or fraud.

Appeal from Bay; Collins, J. Submitted January 15, 1914. (Docket No. 94.) Decided April 7, 1914.

Bill by Catherine Van Haaren against Teresa Tierney for a lien upon lands of John Coryeon, decedent. From an order sustaining a demurrer to complainant's bill, she appeals. Affirmed.

W. A. Collins, for appellant.

Gillett & Clark, for appellee.

KUHN, J. The bill of complaint filed in this cause alleges, in substance, that complainant, who was born

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on April 17, 1887, was taken from the St. Vincent's Orphan Home in Saginaw, at the age of 7, and placed in the home of John Coryeon, where she remained until she was 17 years old, when, it is alleged, she was forced to leave and compelled to shift for herself; that while at this home it was represented to her that she was a legally adopted child, but that she has been unable to find that any proceedings for adoption have been taken; that she was illtreated and compelled to labor beyond her strength and years. John Coryeon died March 23, 1906, and by his will bequeathed his estate, real and personal, to his wife, Christine Coryeon, who died before this bill was filed, and to his daughter, Teresa Tierney. Commissioners on claims were appointed in the estate, but no claim was presented by or on behalf of the complainant. The administrator of the estate was discharged May 15, 1908. The complainant asks to have $1,000 allowed to her for services rendered, and prays that the court decree a lien for the same upon certain lands received from the estate of John Coryeon by Teresa Tierney.

The demurrer filed by the defendant alleges:

(1) That there is no equity on the face of the bill; (2) that the bill of complaint fails to state a cause of action within the jurisdiction of the court; (3) that under the facts stated in the bill defendant is subject to no liability for the indebtedness, if any, of John Coryeon, deceased; (4) that complainant's claim, if any, is barred because of her failure to seek her remedy in the probate court; (5) that complainant is guilty of such laches as to bar relief in equity; (6) that no agreement for compensation is alleged; and (7) that there is nonjoinder, in the failure to join the heirs or representatives of Christine Coryeon, deceased.

Section 9380, 3 Comp. Laws (4 How. Stat. [2d Ed.] § 11091), provides:

"(9380) Sec. 14. Every person having a claim

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against a deceased person, proper to be allowed by the commissioners, who shall not, after the publication of notice as required in the second section of this chapter, exhibit his claim to the commissioners within the time limited by the court for that purpose, shall be forever barred from recovering such demand, or from setting off the same in any action whatever."

This statute has been construed by this court and its terms enforced. See *Winegar* v. *Newland,* 44 Mich. 367 (6 N. W. 841); *First Nat. Bank* v. *Sherman's Estate,* 117 Mich. 602 (76 N. W. 97); *Benjamin* v. *Early,* 123 Mich. 93 (81 N. W. 973); *Draper* v. *Brown,* 153 Mich. 120, 135 (117 N. W. 213); *Thurber* v. *Aldrich,* 167 Mich. 656 (133 N. W. 620).

The bill of complaint contains no allegations of fraud, ignorance, or mistake.

Did the minority of the complainant change the legal situation and excuse failure to proceed as required by the statute? Section 9380 being "a statute of nonclaim," a different rule has been applied by the authorities than in case of "a statute of limitations." The general rule is laid down in 18 Cyc. p. 467:

"The limitation of time within which claims must be presented for allowance in the probate court is inseparable from the peculiar procedure prescribed in each jurisdiction; it is a part of that procedure and so not like a general statute of limitations, and can only be applied to persons who are bound by such special mode of procedure. But where the statute of nonclaim makes no exception as to any persons or class of persons, the courts can make none; and hence in the absence of some provision to the contrary, the statutes of nonclaim run against nonresident as well as resident, and infant as well as adult claimants, and also against insane persons, and the estate of a deceased creditor."

Our statute makes no exceptions as to persons or classes of persons, and under the rule the minority of the claimant did not suspend the application of the statute. See *Morgan* v. *Hamlet,* 113 U. S. 449 (5 Sup.

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Ct. 583). Because of this conclusion it will be unnecessary to discuss the other grounds of demurrer.

The decree of the court below is affirmed, with costs to the defendant.

McALVAY, C. J., and BROOKE, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

DUDLEY A. TYNG & CO. v. CONVERSE.

1. CONTRACTS—OFFER AND ACCEPTANCE—MEETING OF MINDS.
   Before a contract can be completed there must be an offer and acceptance.

2. SAME—CONSTRUCTION—SALE—PRINCIPAL AND AGENT.
   Where defendant wrote to plaintiff corporation to buy certain stock at a price mentioned, and later told plaintiff's representative over the telephone to let the offer stand, that defendant would be glad to get the stock at that price any time, although plaintiff's version of the conversation was disputed by the defendant, there was sufficient evidence to sustain a finding that the defendant had given a standing order for the purchase of the stock.

3. SAME—FRAUDS, STATUTE OF.
   An offer may be accepted by telephone or telegraph.

4. SAME—PLACE OF ACCEPTANCE—CONFLICT OF LAWS.
   The place of a contract is generally determined by the place at which the acceptance is given: the contract is made where the acceptance is posted.

5. SAME—TELEPHONE—ACCEPTANCE—PRIVATE INTERNATIONAL LAW.
   An acceptance of an offer made by telephone completes the contract as of the place where the acceptance is communicated.

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6. SAME—FRAUDS, STATUTE OF.

Illinois having no statute of frauds, an offer accepted by telephone from Chicago is valid, although the amount of property involved exceeds $50.

7. SAME.

In order to bind the plaintiff, it was not essential that it should have title to the stock which it bound itself to secure.

Error to Jackson; Parkinson, J. Submitted January 12, 1914. (Docket No. 54.) Decided April 9, 1914.

Assumpsit by Dudley A. Tyng & Company, a foreign corporation, against Warren T. Converse for breach of contract of sale. Judgment for plaintiff. Defendant brings error. Affirmed.

Wilson & Cobb, for appellant.

Price & Whiting, for appellee.

KUHN, J. The plaintiff, an Illinois corporation, brought an action in assumpsit against the defendant to recover the difference between the agreed price of $138 per share and the price received at a sale, $120 per share, for 50 shares of the common capital stock of the American Fork & Hoe Company. The defendant, who had traded in this stock, on March 31, 1911, sent plaintiff the following letter:

"DUDLEY A. TYNG & CO.,
"Chicago.

"*Gentlemen:*

"I will buy any part of 50 shares American Fork & Hoe Com. at 138 per share. Advise me promptly if you have anything to offer at this price.

"Very truly,
"W. T. CONVERSE."

In reply he received the following:

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"CHICAGO, April 1, 1911.

"MR. W. T. CONVERSE,
"Jackson, Mich.

"*Dear Sir:*

"We note that you have raised your offer on American Fork & Hoe common, and will buy any part of 50 shares at $138 per share, and we will keep the same open until canceled.

"We regret we were unable to fill the last order we had from you, but other people bid our client a higher price than we could afford to pay and stock got away from us.

"We thank you for your business to date however and hope we may serve you in the near future.

"Yours truly,
"DUDLEY A. TYNG & CO.,
"By A. M. ANDREWS."

Between the 5th and 8th of April, Mr. Andrews, in Chicago, representing the plaintiff company, and the defendant, in Jackson, had a conversation over the long-distance telephone. There is no dispute that such a conversation took place, but some controversy is had as to what the conversation was. It is contended by Mr. Andrews, that his company had carried on its books for the defendant what is known as an open order for 50 shares of the stock at $138 per share; that while carrying this order the defendant bought 28 shares of the common stock of the same company at $145 per share; and that when the talk occurred by which the defendant ratified this order for 28 shares at $145 each, he asked the defendant if he wanted to cancel his order for 50 shares at $138, and that the defendant replied, "No, let it stay in. I will be very glad to get it at that price any time I can get it;" and that he replied, "Very well, we will leave it open as it stands." Mr. Converse, on the other hand, claims that when asked by Mr. Andrews in the telephone conversation concerning the so-called order for 50 shares he said that while he would have been glad to get that stock, he was at the time well

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supplied and had all he could handle, and denied that he made the statements testified to by Andrews. On April 19th plaintiff sent defendant this telegram:

"W. T. CONVERSE,
"Amn. Fork & Hoe Co.,
"Jackson, Mich.

"Sold you fifty American Fork Hoe hundred thirty-eight as per your open order can possibly supply fifty more.

"DUDLEY A. TYNG & Co.
"1234 p. m."

—and received in reply:

"DUDLEY A. TYNG & Co.,
"184 La Salle St. Chgo.

"Cannot accept the fifty shares. Have bought all can handle.

"W. T. CONVERSE."

On the same day the following letters were exchanged between the parties:

"CHICAGO, April 19, 1911.

"MR. W. T. CONVERSE,
"American Fork & Hoe Co.,
"Jackson, Mich.

"*Dear Sir:*

"We hereby confirm wires passed between us today: 'Sold you fifty American Fork Hoe hundred thirty-eight as per your open order. Can possibly supply fifty more.' Your reply: 'Cannot accept the fifty shares. Have bought all can handle.'

"In the writer's subsequent conversation with you over the long-distance telephone you acknowledge having given us this order and that you had bought the stock some place else without canceling it.

"We have acted in good faith and up to this time our deals with you have always been satisfactory. We had no reason to suppose that you were in any trouble or were not in a position to take stock for which you gave us orders. We believe you to be an honorable man and ready to take care of your obligations when possible. We have therefore offered to carry this stock for you if you will give us $500 or

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$1,000 on account to take care of the matter until you can get straightened around.

"The writer particularly asked at the time we sold you the last block of stock whether or not you wanted this order canceled at $138 and you told him no, if we could get it at that price you would be glad to take it.

"We hope you will see your way clear to take care of us, as we do not wish to go to our attorneys about a matter on which the right and wrong is so obvious.

"We are unable to get a bid for the stock this afternoon but will try the first thing in the morning and are awaiting your letter which you have promised to write us tonight.

"Yours very truly,
"DUDLEY A. TYNG & Co.,
"By A. M. ANDREWS."

"JACKSON, MICH., Apl. 19—11.
"DUDLEY A. TYNG & Co.,
"Chicago.
"*Gentlemen:*

"Confirming our phone conversation will say I am very sorry I did not cancel my order with you. But since placing the order have bought two lots of you at much higher prices, and have also taken small lots from other houses, and now have all I can handle. If I had the wherewith to pay for same would be glad to get several hundred shares at present prices. Am very sure it would be a good investment. The stock I have recently bought has all been put with the bank, and I have gone my limit. Cannot take more at present at any price.

"Very truly,
"W. T. CONVERSE."

Mr. Andrews testified that after receiving the telegram in which defendant refused to take the 50 shares he called him by long-distance telephone, and Mr. Converse said, in substance, that he was sorry he had forgotten to cancel the order, but that he was unable to purchase the stock and would write fully about it that night. It is plaintiff's claim that when defendant refused to take the stock they offered it on the

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market and sold it on April 21st at the best price obtainable, $120 per share. Plaintiff, in the trial court, had a verdict for $943.12, the difference between the price contracted for and the price received at the sale, and interest thereon. It is the contention of the defendant that the letter of March 31st was a present offer to buy, and that to have made a binding contract it would have been necessary for plaintiff to accept the offer without any terms or conditions, and that the letter of April 1st was not such an acceptance. It is the theory of the plaintiff, and it was upon this theory that the case was tried and submitted to the jury, that the correspondence and telephone conversation created an open or standing order which was accepted when the plaintiff notified the defendant that it had sold him the stock as per such open order. It is an elementary proposition that before an offer can become a binding promise and result in a contract it must be accepted. While there is dispute as to what the telephone conversation in the early part of April was, the claim that there was an open or standing order, and that it was so understood by the parties, received its strongest corroboration in the letter of April 19th, in which defendant says:

"Confirming our phone conversation will say I am very sorry I did not cancel my order with you."

This is a direct admission that he considered that he had an open order with plaintiff which he failed to cancel. There can be no question that if plaintiff had failed or refused to deliver the stock after agreeing to furnish in the telegram of April 19th, it would have been liable in damages to the defendant.

It is contended by the defendant that if there was a contract it was a Michigan contract, and that if the telephone conversation is held to be binding, it should be governed by the laws of Michigan, which provide that an oral agreement to purchase property

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of the value of $50 or upwards is not binding unless in writing. Section 9516, 3 Comp. Laws (4 How. Stat. [2d Ed.] § 11400). There is no question in our minds that if there was an acceptance of the offer it was accepted in Chicago. An offer may be accepted by telegram or by telephone. *Bank of Yolo* v. *Flour Co.*, 141 Cal. 314 (74 Pac. 855, 65 L. R. A. 90).

Elliott, in his work on Contracts, vol. 1, § 46, says:

"Contracts may be consummated by means of telephonic conversations. When a person places himself in connection with another by means of the telephone system he thereby invites communication relative to his business through that channel. In a recent case, referring to an argument against the validity of such a contract, it is said:

"'If by this is meant that a contract cannot be made by telephone conversation, it is too late to so argue. A large part of our business transactions are, in this century, carried on by telephone. Our courts have long ago held that contracts made by telephone are as effective and binding in law as if made verbally between the parties standing face to face and carrying on the conversation which culminates in the contract.'"

Also, at section 62:

"The place of the contract is also usually determined by the place where the acceptance is given. Thus, an order to make certain bets having been transmitted by postal telegraph from the plaintiff without the city of London to the defendant within it, he telegraphed from the city that the order had been obeyed. It was held that the contract of agency was made in the city. And where an offer was made in Boston, and accepted by telegram from Providence, it was held that the contract was made in Rhode Island, although to be performed in Massachusetts. Likewise the contract is made at the place when the acceptance is mailed. If the communications are had over the telephone the contract is deemed to have been made at the place where the offer of one is accepted by another. The place of contract is material as *prima facie* denoting the law by which it is to be construed and regulated."

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It is clear that if a contract was established it was an Illinois contract (*Douglass* v. *Paine,* 141 Mich. 485 [104 N. W. 781]), and it was conceded upon the trial that there is no statute of frauds in Illinois in reference to the sale of goods, wares, and merchandise.

It is further contended that if there was a binding contract plaintiff did not, at the time, have control of the stock, and could not have delivered it. The plaintiff had bound itself to deliver the stock, and the defendant refused to accept it. It was not necessary for plaintiff, in order to bind itself in the way that it did, to have had title to the stock. *Gregory* v. *Wendell,* 40 Mich. 432.

We have examined the assignments of error with care, and we are of the opinion that the issue involved was properly submitted to the jury without prejudicial error.

Judgment affirmed.

McALVAY, C. J., and BROOKE, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

DOMBROWSKI *v.* ROE-STEPHENS MANUFACTURING CO.

1. MASTER AND SERVANT—NEGLIGENCE—WARNING—NOTICE.

Where a servant had worked at a saw for seven months and knew the dangers connected with its operation and could offer no explanation why it failed to work properly, except that the board jumped and forced his hand against

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the teeth, defendant was not liable for failing to warn him of the erratic action of the saw.[1]

2. SAME—NEGLIGENCE—PROXIMATE CAUSE.

The absence of a spreader on a ripsaw, designed to prevent a fly-back resulting from the material pinching, was not the proximate cause of plaintiff's injury which resulted from a plank jumping up and forcing the operator's hand against the ripsaw.

Error to Wayne; Hally, J. Submitted January 14, 1914. (Docket No. 30.) Decided April 7, 1914.

Case by Adam Dombrowski against the Roe-Stephens Manufacturing Company for personal injuries. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Florian, Moore & Wilson, for appellant.

Keena, Lightner, Oxtoby & Oxtoby, for appellee.

KUHN, J. From a judgment entered on a directed verdict for the defendant, the plaintiff appeals. The plaintiff, 26 years of age, was a molder's helper in the foundry department of defendant's plant. While operating a circular ripsaw in the wood-working department, his left thumb and first and second fingers were severed at the knuckles. He had been employed about one year and nine months before the injury, and during the last nine months had frequently used the ripsaw, and occasionally during the first year. The plaintiff described the way in which the accident occurred as follows:

"I took a piece of plank, and I wanted to cut it in half, in one strip. Then I cut through half, and when I cut through about a half the plank started to jump. And when it began to jump then I held it down with my hand, so that it would not jump. And when I

[1] On the question of the master's duty to warn or instruct servant as affected by servant's knowledge or experience, see note in 44 L. R. A. 40.

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began to press down on the plank to hold it down it flew up, and as it flew up my hand came in contact with the saw and cut my fingers.

"*Q.* How long was it from the time the plank began to jump to the time you got your fingers cut?

"*A.* Not long. It began to jump, and right after it flew up.

"*Q.* Was it a minute, a second, or two minutes or three minutes?

"*A.* It was not even a minute."

On cross-examination he stated that the saw had worked well, and that he did not know why the piece flew up, as it had never done so before. There had been a fire in the plant, which necessitated the purchase of a new ripsaw, and the saw on which the plaintiff was injured was installed in December, 1910; the injury occurring on July 24, 1911. Several other molders were sworn, who testified that while operating this saw at various times boards had jumped from the table. Plaintiff's counsel state their position in this court as follows:

"*First.* That plaintiff should have been warned as to the erratic action of the saw, and that failure so to warn is evidence of negligence.

"*Second.* That the defendant should have provided the saw with a splitter or spreader in conformity to the general custom, and that failure so to do was evidence of negligence."

It appears from this record that plaintiff had more knowledge of this saw than any other person who worked on it. For nineteen months he had used such a saw, and this particular saw for seven months of that time. He knew how to operate the saw, and knew of the dangers in connection with it. When he had operated it the saw had always worked well, and there had never been any trouble with it. He can give no reason why it did not work well when he was injured. The case comes within the ruling of the court in *Berlin* v. *Mershon & Co.*, 132 Mich. 183 (93 N. W. 248).

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See, also, *Bauer* v. *Foundry Co.*, 132 Mich. 537 (94 N. W. 9); *Mushinski* v. *Vincent*, 135 Mich. 26 (97 N. W. 43); *Fryezynski* v. *Leather Co.*, 171 Mich. 113 (137 N. W. 56).

In his denial of a motion for a new trial, the learned circuit judge said:

"Now, what caused the jumping of this wood? Under the testimony this would come from a dull saw, a saw improperly 'set,' or not 'set' at all; from the wet condition of the wood; from a peculiar grain in the wood; and after the wood passed the saw from a lack of 'spreader.' Plaintiff showed there was no 'spreader.' But this device had not been ordered installed by the factory inspector, and it was not shown that its use was so general that its absence would be deemed negligence. As to the other possible causes of the 'jump,' there was no testimony at all, except of the one witness who expressed an opinion that the saw was dull. He did not say, nor was he asked, how he knew this, or when it was that he made the inspection which led to the opinion given. Plaintiff had no theory of how or what was the moving cause of the accident. He did not make out a case of negligence on the part of the defendant, unless it is to be assumed that the happening of an accident, coupled with testimony that machinery does not at all times work with perfect smoothness, is sufficient to justify the plaintiff in going to the jury."

From the testimony of experts sworn by the plaintiff, it appears that "spreaders" are used to prevent what is known as a fly-back, or kick-back, caused by the binding of the wood back of the saw, which revolves towards the operator. As a result, the board comes straight back, and is liable to strike the operator. Mr. Cuyler, a witness for plaintiff, on cross-examination, explained this as follows:

"*The Court:* What do you call it when it only jumps from an inch to three inches? The testimony in this case is that the board only jumped up three inches; never got any higher.

"*A.* Must have been something wrong, because any

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man that has worked in a sawmill or around a mill of any kind, around a saw of any description, knows very well that a saw will naturally throw a board back.

"*The Court:* There isn't any evidence in this case that the board was ever thrown back. The board jumped. The highest it ever jumped was three inches.

"*A.* Did not go back?

"*The Court:* No. There isn't any evidence of any throw-back or fly-back, whatever you call it. The highest it ever jumped was three inches. What do you call that?

"*A.* I don't know what to think about it. That is something new to me. I have been around saws all my lifetime.

"*The Court:* Have I misstated the testimony in that respect?

"*Mr. Oxtoby:* No, your Honor.

"*Mr. Wilson:* Except the plaintiff, who said it jumped up on top of the saw, as I understand.

"*Mr. Oxtoby:* No.

"*The Court:* If the plaintiff said that, I want to hear the testimony.

"*Mr. Oxtoby:* So do I.

"*The Court:* I have no recollection of that, and I paid pretty close attention.

"*A.* Yes; they certainly did.

"*Q.* But other than the three factories that you have been in, where you have seen spreaders, you cannot say of your own knowledge whether the thousand and three factories in the city of Detroit use spreaders or not? Do you understand my question?

"*A.* I would not tell you a thing here that I don't know.

"*Q.* You don't know it?

"*A.* I don't know it.

"*By the Court: Q.* You don't know what would cause that?

"*A.* Cause what?

"*Q.* This jumping of an inch or inch and a half or three inches?

"*A.* I will tell you. Whenever a board gets on top of a saw, it goes. It don't stop and jump up and down on the table at all.

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"*Q.* That is not exactly what I asked you.

"*A.* I got as near as I could to your idea.

"*Q.* The testimony, as I understand it, is that as this piece was being sawed, for instance, that these boards here would jump; this end of them would jump an inch, inch and a half; one witness testified to three inches, but there was never any fly-back.

"*A.* Well, there was something wrong there, because I will tell you. Any man that knows anything about a saw—

"*Mr. Wilson:* Do you mean there is something wrong with the saw?

"*A.* There is something wrong in the testimony there about it jumping two or three inches or an inch and a half, because when a board raises on a saw it is going to come back. It ain't going to stay right there, jumping two or three inches high. It is going to go. Isn't that right?"

It does not appear that there was a fly-back, or kick-back, at the time plaintiff was injured, and as a result it follows that the absence of a spreader could not have had anything to do with the accident.

We are of the opinion that no negligence was shown on the part of the defendant, and that the trial judge reached a proper conclusion in directing a verdict in its favor.

The judgment is affirmed.

MCALVAY, C. J., and BROOKE, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

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CORBY *v.* CITY OF DETROIT.

1. TAXATION—SPECIAL ASSESSMENT—APPORTIONMENT.

   Where a pavement was constructed in front of plaintiff's property, and an assessment levied on all the property in the district by the front-foot rule, and it was taxed for the same amount as other property in the district, although the pavement was 60 feet wide in a part of the district and only 46 feet wide in front of complainant's land, the presumption that such method of assessment was equitable, which usually prevails, would not apply.[1]

2. MUNICIPAL CORPORATIONS — COUNCIL — ASSESSMENT—EQUALITY —ASSESSMENT DISTRICT.

   If the municipal authorities deem it expedient to build pavement of materially different widths or qualities on the same street, they should provide different assessment rolls in separate districts.

3. SAME—CONFIRMATION—UNIFORMITY.

   Under 1 Comp. Laws, § 2786 (3 How. Stat. [2d Ed.] § 6005), providing that the assessment roll when confirmed by the village council should become final and conclusive, the action of the common council in confirming an assessment roll which violates the fundamental principles of the statute as to the uniformity or equality of the tax is not final or conclusive.

4. SAME—ESTOPPEL.

   In an action to recover back taxes paid under protest for paving, which plaintiff claimed was not of uniform width throughout the tax district, and that he should not be compelled to pay the same assessment as had been levied on property in front of which wider pavement had been built, the principle of estoppel did not preclude plaintiff from recovering a judgment for the excessive amount paid, where he had protested against the method of assessment from the beginning of the levy but did not file a bill to enjoin the improvement.

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[1] The authorities on the question of assessments for improvements by the front-foot rule are gathered in an extensive note in 28 L. R. A. (N. S.) 1124.

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5. SAME—INTEREST—PENALTY.

Interest and the statutory penalty are chargeable to a taxpayer who did not pay or tender his just proportion of a special assessment for paving purposes until after the return to the county treasurer, several years after the improvement had been made, and in an action to recover a claimed excessive proportion, the fact that for some time the adjustment of the tax between the village and city of Detroit in which the village had been partly included and the village of Grosse Pointe Park was in controversy did not excuse him from paying the same.

Error to Wayne; Mandell, J. Submitted January 20, 1914. (Docket No. 9.) Decided April 7, 1914.

Assumpsit by Thomas W. Corby against the city of Detroit and village of Grosse Pointe Park for recovery of taxes paid under protest. Judgment for defendants, and plaintiff brings error. Reversed.

Moore & Moore, for appellant.

Walter Barlow (Richard I. Lawson, of counsel), for appellee city of Detroit.

William E. Henze, for appellee village of Grosse Pointe Park.

STEERE, J. In this action plaintiff seeks to recover the amount of certain paving taxes, previously paid under protest, which were levied upon land belonging to him, located in the then village of Fairview. The levy was made pursuant to a special assessment for paving that portion of Jefferson avenue running through said village.

Jefferson avenue is an old, important, and well-known thoroughfare of the city of Detroit, and continues easterly under the same name into contiguous territory, formerly constituting the township of Grosse Pointe, in which plaintiff's land lies fronting on both sides of said avenue. Preliminary steps were

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taken for this paving by the township of Grosse Pointe under authority of a local act of the legislature passed in 1901, and $81,000 was raised by township bonds towards the expense of extending the pavement of Jefferson avenue from the city limits easterly to an intersection known as the Cadieaux Road; but a change of municipal control over that territory took place before the work was done. In 1903 the village of Fairview was incorporated under the general law for incorporation of villages out of Grosse Pointe township territory, and included plaintiff's property. Under the requirements of appropriate local legislation the township turned the money it had raised by bond for paving that portion of Jefferson avenue over to the village. Two years later, in 1905, following various preliminary steps taken by the village authorities, the portion of Jefferson avenue included within its boundaries was paved at an approximate cost of $220,000, provided for by money received from the township as stated, a similar amount to be raised by special assessment, and a bond issue of about $26,000 to cover cost of paving at street intersections and in front of public grounds.

Plaintiff's total frontage on both sides of the avenue is 1,574.30 feet. His premises consist of 120 acres composed of two adjoining private land claims of a combined width of 787.15 feet, across which the avenue runs. His special assessment, first levied in 1905, was $3,826.08. June 27, 1911, he paid to the county treasurer of Wayne county, to whom under a supplementary assessment the taxes had been returned as delinquent, $4,906.94, filing a written protest stating various alleged grounds of invalidity. In the meantime intervening causes had relieved him from legal necessity of immediate action.

The rapid growth of Detroit and its environments in that direction led to extension of its boundaries and changes in the organization of its suburbs. By an act

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of the legislature passed in 1907, the village of Fairview was abolished; a portion of its territory being annexed to Detroit, and the remaining part incorporated as the village of Grosse Pointe Park, plaintiff's premises, except 10 acres remote from Jefferson avenue, coming within the boundaries of the latter.

Under this legislation it was required that "all the books, papers and documents belonging to said village shall be transferred and delivered to the common council of said city or to such offices of said city as they may direct." Provision was also made for an adjustment and assumption between Detroit and Grosse Pointe Park of remaining rights, duties, and liabilities of Fairview. A suit in chancery to determine the proportions between the two municipalities, the details of which need not be given, resulted in a decree providing, among other things, that the city furnish the village of Grosse Pointe Park a duplicate of the special assessment roll for said paving to collect its percentage of the amount remaining unpaid against property now within the limits of said village, which was found to comprise 36.28 per cent. of the original special assessment district. Thereupon the village authorities took proper action to collect the same, and spread a reassessment of such delinquent taxes upon the general assessment roll of said village for the year 1910. Plaintiff not having paid any of the special tax against his property, it was reassessed at the same amount as before. No interest was added, though nearly five years had intervened since the original assessment was made, and the paving done. This tax, so reassessed, was not paid to the village treasurer, and at the proper time was returned as delinquent to the county treasurer.

In authorizing this improvement, and levying an assessment to defray the cost, the village authorities of Fairview acted under the provisions on that subject found in chapter 87, 1 Comp. Laws. Section 2786

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(3 How. Stat. [2d Ed.] § 6005) provides that the expense of paving may be defrayed by special assessment upon the abutting premises in proportion to the number of feet front upon the street. Subchapter 8 relates generally to improvements and assessments, and section 10 (Compiler's section 2840) declares:

"When any special assessment shall be confirmed by the council, it shall be final and conclusive."

The record shows a series of meetings, beginning on June 5, 1905, held by the village council in which the various steps provided by statute appear to have been taken. At a meeting held on July 3, 1905, a special assessment roll for this improvement, prepared by the village assessors, was presented, and a resolution adopted that the assessors meet with the council on July 20th for the purpose of reviewing said assessment roll. Notice of this meeting was given, and on July 20th the council and board of assessors met together for that purpose, and, not concluding their work on that day, adjourned said meeting till July 24th, on which date the council and board of assessors met together, heard objections, and reviewed the roll. During this meeting the council referred the roll back to the board of assessors for certain corrections which were at once made, and the roll forthwith again reported to the council, whereupon, and before adjournment, the council adopted a resolution confirming said special assessment roll, also directing the clerk to indorse thereon a certificate showing the date of said confirmation, and attach thereto a certified copy of the resolution.

While some question is raised by defendants as to plaintiff having made protest against this tax at the proper time, we think the record shows that he did in that particular protect his rights by appearing before both the board of assessors and the council and urging his objection.

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It was conceded on the trial that the total length of this paving, measuring both sides of the avenue as assessed, was 19,587.1 feet or 3.7 miles, and that the same amount per front foot was assessed against the abutting property for the entire distance, regardless of the width or character of the pavement in front of any portion of the property. Of this, 12,020 feet easterly from the limits of the city of Detroit was paved 60 feet wide, the 3,040 feet next east being 48 feet wide, and the balance continuing to the east village limits, was but 46 feet wide. Plaintiff's property all fronted on the narrowest portion, farthest from the city. His assessment for a pavement 46 feet wide was the same amount per front foot as that on property nearest the city for a pavement of the same kind 60 feet wide.

If the assessment as originally made by the village of Fairview in 1905 was valid, the subsequent steps taken by its assessors to collect the unpaid portion of the tax are not open to question. Plaintiff's indicated grievance was and is, not that the improvement was made, and he was taxed for it, but that the uniform front-foot rule of assessment adopted, when applied to the varying width of the pavement in the assessment district as planned and carried out, was not and could not be, under the facts shown, just and equal between the parties assessed, or according to benefits.

It is urged against this by defendants that the plaintiff's remedy, if any, was by a bill in chancery; that assessment in proportion to frontage is the method authorized by statute, and has many times been sustained by the courts as a rule of apportionment on the whole more just than any other; that plaintiff is estopped from now objecting through having stood by and allowed the work to be done without taking action, and especially by reason of the village council having confirmed the special assessment roll.

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At the conclusion of the testimony on the trial of said cause both parties asked for a directed verdict on the undisputed evidence. The court was of the opinion that the questions raised by plaintiff could not be considered in view of the provisions of said section 2840, and directed a verdict for defendants, quoting the statute, and saying, "This special assessment was confessedly confirmed by the council, and in my judgment it thereupon became final and conclusive."

At the inception of this inquiry we are confronted with a somewhat novel situation, radically different from any of the cases cited by counsel, in the particular that here the pavement in the same assessment district is of varying width, and a uniform front-foot cost is assessed, while in those cases the pavement is of uniform width, and the assessment presumptively equitable, as each owner is required to pay the same for the same amount of paving in front of each foot of his property. Can such presumption arise here, where the record discloses no reason why the pavement was not made of uniform width, or why the charge was uniform? Or, to go farther back with the inquiry, does the uniform foot-front rule authorized by the statute contemplate or permit its application, in one assessment district, to a plan of improvement with such variations in different parts of the district? If so, it would seem to follow that the authorities can, in their discretion, provide for a cheap and inferior pavement 20 feet wide in front of one man's property and an expensive pavement of superior quality 60 feet wide in front of that of another, and assess each the same amount per front foot. The improbability of this being done does not affect the principle. It is only a matter of degree.

While the cost of preparing the highway for paving may vary along different parts of the way, the rule contemplates that exact equality cannot be reached

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in tax cases, and approximate justice is attained when each owner pays for the same kind of finished improvement in front of his property in proportion to frontage. It is said, "The idea that underlies statutes for this purpose is, that the benefit to the abutting lots is generally in proportion to the length of their respective fronts, and that as a rule this principle of apportionment is more just than any other" (*Thomas v. Gain*, 35 Mich. 155 [24 Am. Rep. 535]); and the principle is sought to be strengthened in our statute by a provision that where, owing to the size or shape of a particular lot, the rule works particular injustice, the authorities may assess such lot for such number of feet frontage as in their opinion would be just.

"The whole tenor of the law upon that subject is to maintain an equal foot-front assessment on all property, equitable and proportionate to benefits, with a discretion given the assessing authorities to assess for a less number of feet, but at the regular price per foot in cases where justice and equity demand it." *Cote v. Village of Highland Park*, 173 Mich. 201 (139 N. W. 69).

We think the uniform foot-front rule contemplates a uniform system of improvement within the assessment district. If the municipal authorities decide it expedient to build pavements of materially different width or quality in different localities, they could and should provide different assessment rolls, in different assessment districts, therefor. We think this course is contemplated and authorized by section 2786, 1 Comp. Laws.

Confirmation by the council of any special assessment roll which, in its application to proposed improvements, violates the fundamental principles of the statute on which its validity depends is not final and conclusive upon that question.

In connection with the steps taken subsequent to the disorganization of Fairview in 1907, it is urged

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that the city of Detroit cannot be held liable in this action, because it never received, and is not entitled to, any of this money paid by plaintiff under protest; that the tax was not levied upon land annexed to the city. The steps referred to were taken under Local Act No. 1, p. 56, Extra Session 1907, which provides:

"All suits or actions, either at law or in equity, hereafter commenced upon any debt, obligation or right of action, in favor of or against said village (Fairview) shall be prosecuted by or against the city of Detroit and the village of Grosse Pointe Park as the case may be. Any judgment hereafter rendered upon any such debt or obligation or in any such suit shall be paid by said city of Detroit and said village of Grosse Pointe Park in the above proportion and may be enforced as judgments against municipalities are usually enforced and as provided by law for the enforcement of judgments against the city of Detroit and villages."

Under said act the city of Detroit and village of Grosse Pointe Park acquired together all the property and rights of the village of Fairview, and became responsible for its obligations. With the aid of a court of chancery, they adjusted such matters between themselves; but this did not necessarily relieve either as to third parties. This paving was done by Fairview as one improvement in a single district now partly belonging to Detroit and partly to Grosse Pointe Park. If a wrong was done, it was inflicted when the assessment was made and confirmed, and affected one way or the other all property then within the assessment district. Grosse Pointe Park, as to third parties at least, in putting the unpaid tax on its tax roll, was acting for both itself and Detroit, and the county of Wayne collected it for both. Plaintiff is not concerned with the accounting and division of interests between these two. Under the special act referred to we think that, if the village of Fairview would have been liable, both defendants to this action

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are liable; the judgment when obtained, however, to be paid or enforced in the proportion and manner specified in the statute.

Plaintiff's position in this litigation is consistent with his attitude and protests to the village authorities when the assessment was levied, and the pavement laid. He was agreeable to the improvement, and did not desire to prevent it, but protested that the assessment was inequitable and unjust, not made on a proper basis under the statute, and that he should not be compelled to pay for 60 feet, unless that width was laid in front of his premises. On the trial in the lower court his counsel, though insisting that the tax is invalid in its entirety, and asking a judgment to that effect, if an equitable reduction could not be legally made, said, "Mr. Corby would prefer to adjust all the equities right here;" and on the oral argument in this court took the same position, saying, "We went to the council and asked for 60 feet, and they refused us, * * * our whole objection is their charging us for what we did not get," and suggested that this court could equitably and finally dispose of the matter along lines indicated in *Fletcher Paper Co.* v. *City of Alpena*, 160 Mich. 462 (125 N. W. 405).

Defendants' counsel say to this, "Plaintiff having placed his case on equitable grounds, equitable rules should be applied," citing *Tuller* v. *City of Detroit*, 126 Mich. 605 (85 N. W. 1080), and cases cited there; *Nowlen* v. *City of Benton Harbor*, 134 Mich. 401 (96 N. W. 450); *Farr* v. *City of Detroit*, 136 Mich. 200 (99 N. W. 19); and *Stewart* v. *City of Detroit*, 137 Mich. 381 (100 N. W. 613).

These cases and many others which might be cited apply the equitable doctrine of estoppel to persons who had knowledge that improvements which enhanced the value of their property were being made, stood by, and took no steps to prevent them proceed-

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ing, but later, after having received the benefit of the same, brought suit to defeat the tax on technical grounds, and thus escape paying their just share of the cost of such improvements.

In this case plaintiff, not objecting to the improvement, and standing willing to pay his just share according to a proper assessment, timely interposed his objection to the unjust excess imposed upon him by the method of assessment pursued. As applied to that portion of the tax which he ought of right to pay, those authorities are well in point.

In this equitable action of assumpsit it is permissible, under *Fletcher Paper Co.* v. *City of Alpena, supra,* and cases there cited, to conclude this litigation by a judgment in plaintiff's favor for the amount his taxes were unjustly increased by reason of the wrongful assessment, together with the penalties, interest, and fees relating thereto and collected, provided the record furnishes sufficient data therefor; and we are asked to do so.

Taking the full amount assessed and the total number of square yards as a basis, the overcharge of which plaintiff complains is $808.67. Deducting this from $3,826.08, the amount actually assessed against him, his just tax, due July 24, 1905, would be $3,017.41. He did not pay or tender this until June 27, 1911. We cannot agree with his contention that no interest, penalties, or fees should be added to this amount. It is true that delays and a somewhat chaotic condition of municipal affairs in that territory resulted for a time from the disorganization of Fairview village and subsequent readjustments; but the facts remain that the improvement in front of plaintiff's property had been made, and he had the benefit of it during all the intervening time, and paid nothing. To stand on equitable grounds as to his just proportion of the tax, he could and should, when it was due, have paid or

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tendered that amount to the village treasurer. We see no equitable reason why he should be relieved from interest and fees as to that which he of right should have paid when due.

The record shows that on the trial in the court below all parties requested the court to direct a verdict, claiming no questions of fact for a jury were involved; the only issue being upon propositions of law.

The case will be remanded to the trial court, with instructions to compute the tax against plaintiff as above indicated, and enter a judgment in his favor for the balance. Plaintiff will recover costs of both courts.

McALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

GARDNER v. LE FEVRE.

1. ASSIGNMENTS—LIENS—BAILMENTS—MECHANICS' LIENS FOR REPAIRS.

   The lien of an automobile repair man for repairs and a tire furnished to the owner of an automobile is assignable and enforceable in favor of the assignee who obtains possession of the machine. 3 Comp. Laws, § 10054 (5 How. Stat. [2d Ed.] § 12704).[1]

2. SAME—FREIGHT CHARGES—PAYMENT, APPLICATION OF.

   While an item for freight paid by the garage owner was not assignable as a part of the account, it could be treated as paid by the proprietor of the automobile out of $75

[1] As to the right of the owner of a garage to a lien, see note in 1 L. R. A. (N. S.) 240.

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which had been advanced by the owner on account, and which more than covered the freight.

3. SAME.

Although defendant may not have had a lien for an extra tire furnished for the automobile, he was entitled to a common-law lien on the tire for its value.

Error to Muskegon; Sullivan, J. Submitted January 20, 1914. (Docket No. 118.) Decided April 7, 1914.

Replevin by John H. Gardner against George Le Fevre for an automobile. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Turner & Turner, for appellant.

William Carpenter, for appellee.

MOORE, J. In 1911, the plaintiff, who owned an automobile, a Thomas flyer, then at Tecumseh, Mich., made an arrangement with one Eyke, who owned a garage at Muskegon, to the effect that the automobile would be shipped by rail to Muskegon, and would be received by Mr. Eyke and put in repair for the plaintiff. The automobile was shipped, and upon its arrival in Muskegon Mr. Eyke paid freight upon it to the railroad company, amounting to $33.60. He also furnished an extra tire, which was strapped into the receptacle for extra tires on the side of the machine. The charge for the tire was $50.75.

All this was done prior to September 15, 1911, at which time a settlement was made between Mr. Gardner and Mr. Eyke, and $75 was paid on the account, leaving a balance of $171.60. Mr. Gardner was an actor, going about from place to place, and it was agreed at the time of settlement that the machine should remain for the present with Mr. Eyke, and that Mr. Gardner should pay storage at the rate of $1 a week until he should pay the account and take

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the car away. Later Mr. Eyke went out of business and assigned his account and claim to the defendant. The plaintiff made a demand upon the defendant for the automobile, without offering to pay the account. The defendant declined to deliver the machine until the account was paid, and replevin was brought. Upon the trial the judge directed the jury to find that the title to the automobile was in the plaintiff, but that defendant had a lien thereon for the balance due on account, with interest amounting in all to $164.85, and a verdict and judgment was so entered. The case is here by writ of error.

It is claimed the right to enforce a lien cannot be assigned, citing *Caldwell* v. *Lawrence*, 10 Wis. 331, and *Pearsons* v. *Tincker*, 36 Me. 384. Whatever else may be said of these cases, we think they are not the law of this State. Section 10054, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 12704), recognizes the right to assign choses in action and other property rights. See cases cited in note to this section. In *De Witt* v. *Prescott*, 51 Mich. 298 (16 N. W. 656), Justice CAMPBELL, speaking for the court, said:

"The more important allegations of error relate to the rulings of the court as to what circumstances would relieve defendants from responsibility for the result of the replevin suit, and discharge them from any lien which may have existed. And several of the charges and refusals complained of are connected with the alleged waiver of the lien, by allowing the lumber to be shipped to Welch & Co.

"The court below held that any delivery of the lumber by Eames to Welch & Co. would discharge the lien, unless preserved by agreement, and that no such agreement would bind defendants or sustain the lien, so far as their responsibility to discharge or defend against it was concerned, unless made with their consent or ratification. This doctrine was laid down very broadly, and it was also intimated that an agreement to remove the lumber from this into another jurisdiction might be treated as fraudulent and injurious

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to defendants. And the court refused to charge that such an agreement, made without fraudulent intent and with no design to injure defendants, would not be of itself a fraud on them.

"We have not found authority for any such unqualified doctrine, and no cases were cited on the argument sustaining it. It is quite uniformly held that an unconditional surrender of possession, or conduct showing a design to discharge the lien, or plainly inconsistent with it, will usually put an end to it. But it seems equally clear that the holder of the lien may allow the owner of the property to take it into his possession and remove it without prejudice to the lien, if so agreed. *Wheeler* v. *M'Farland,* 10 Wend. [N. Y.] 318. And it is also undisputed that such a lien cannot be destroyed by a removal, without the consent of the lienholder, from his possession. And in *Nash* v. *Mosher,* 19 Wend. [N. Y.] 431, Cowan, J., in reviewing the authorities, comes to the conclusion that the holder of a possessory lien can transfer the lien with the possession, as other valuable rights may be assigned."

In this case it is clear Mr. Eyke did not intend to part with his possession and the lien for the benefit of the plaintiff. On the contrary, he assigned the claim and delivered the automobile into the possession of the defendant, to be held by him until the claim was paid.

It is claimed a lien cannot be asserted for the freight paid. We do not think it necessary to say whether, if nothing had been paid by plaintiff on the account, the lien could be enforced. As a matter of fact $75 was paid after the freight bill was paid, and as the amount paid for the freight was the first item of Mr. Eyke's claim, the payment could well be applied upon the freight bill, which it would more than pay. *People, for use of Holmes,* v. *Sheehan,* 118 Mich. 539 (77 N. W. 88); *People, for use of C. H. Little Co.,* v. *Grant,* 139 Mich. 26 (102 N. W. 226).

It is said it was error to hold that the lien attached for the extra tire furnished. Section 10747, 3 Comp.

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Laws (5 How. Stat. [2d Ed.] § 13805), is as follows:

"When any person shall deliver to any mechanic, artisan or tradesman, any watch, clock, article of furniture or jewelry, implement, clothing or other article of value, to be altered, fitted or repaired, such mechanic, artisan or tradesman shall have a lien thereon for the just value of the labor and skill applied thereto by him, and may retain possession of the same until such charges are paid."

One familiar with automobiles and the use made of them would regard an extra tire as part of a properly equipped automobile. A prudent, experienced owner of a Thomas flyer would hardly venture away from home with it without carrying an extra tire. It will be noticed the language of the statute is "to be altered, fitted or repaired." We think, when Mr. Eyke fitted this automobile with an extra tire, which became a part of the outfit, the lien given by the statute attached.

We think it not necessary to discuss, although they have had our attention, the other assignments of error.

The judgment is affirmed.

BROOKE, J., concurred with MOORE, J.

OSTRANDER, J. In my opinion, plaintiff has no lien upon the automobile for the price of the extra tire, nor has he any lien under the statute relied upon for the price of the tire. I agree with the result announced in the opinion of Mr. Justice MOORE for the reasons he gives, and the further reason that plaintiff had a lien at common law upon the tire for its value.

MCALVAY, C. J., and KUHN, STONE, BIRD, and STEERE, JJ., concurred with OSTRANDER, J.

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RICKMAN *v.* RICKMAN.

1. RECEIVERS — INSOLVENCY—ASSETS OF INSOLVENT—LIENS—CONFLICT OF LAWS—EQUITY.

   The appointment of a receiver, in proceedings in this State to dissolve and wind up a partnership that was insolvent, did not destroy the effect of a lien or preference obtained in Wisconsin prior to the filing of the bill by a subcontractor of the copartnership: nor did the receiver have the right or authority to take charge of the assets of the firm so affected by the subcontractor's lien, where no proceedings in bankruptcy had been instituted.

2. INJUNCTION—EQUITY.

   A bill of complaint to enjoin a creditor of the insolvent copartnership, who has garnished funds due to it, from proceeding to enforce his lien, will not lie in behalf of a subsequently appointed receiver.

3. SAME—DEBTOR AND CREDITOR—JUDGMENT CREDITORS' CLAIMS.

   Nor should an injunction be allowed which would deprive creditors of this State of their liens obtained in another, leaving creditors of foreign jurisdictions to exhaust a fund due to the insolvent by suits or garnishment proceedings in their courts.

4. RECEIVERS—EFFECT OF APPOINTMENT—PARTNERSHIP, DISSOLUTION OF.

   After the receiver has been appointed, the creditor's right to sequester property by attachment or other method of obtaining priority is suspended.

5. SAME—PRIORITIES—MARSHALING ASSETS.

   Nor was a Michigan creditor in contempt of court for proceeding in a foreign jurisdiction to take judgment, having commenced proceedings to obtain and enforce his lien as a subcontractor on a public building before any receiver had been appointed.

6. SAME—INTERNATIONAL LAW, PRIVATE—MECHANICS' LIENS.

   Where a subcontractor, who provided work, labor, and materials on a county building in the State of Michigan, brought suit in that jurisdiction under Wisconsin statutes, section 3328, authorizing judgment against the

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county for the amount of the indebtedness due from the principal contractor, he obtained a lien on the funds due from the county to the contractor and was entitled to priority of payment over other creditors who commenced proceedings later to enforce their liens.

7. SAME—COURTS—CONFLICT OF LAWS.
The construction which the courts of Wisconsin place on their statutes should be followed in this State, in proceedings to dissolve a partnership wherein the rights of materialmen and subcontractors, who have obtained prior liens under Wisconsin law upon funds due the partnership, are in question.

8. SAME—LIENS—INSOLVENCY.
The receiver of a copartnership, appointed in proceedings for voluntary dissolution by mutual consent, was not entitled to possession of the fund, since he takes only the rights of the partnership as affected by claims and liens that would prevail against the firm if it attempted to assert rights to the fund.

9. SAME—LIENS.
A lien on the funds due from the county to the general contractor attached when suit was filed in Wisconsin by the subcontractor, and the latter was entitled to proceed with the suits and to hold the money subject to his lien.

10. GARNISHMENT—LIENS—PRIORITY.
It is a general rule that service of process in garnishment creates a lien on the property of the principal defendant, entitling plaintiff to hold such property for the satisfaction of his claim, and it is so recognized in Wisconsin.

11. PARTNERSHIP—PROCESS—SERVICE—SUBSTITUTED SERVICE.
Service of process on one of the copartners in Wisconsin was sufficient to secure a valid lien on the fund which belonged to the partnership.

12. JUDGMENT—RECEIVERS—PARTNERSHIP.
A judgment in Wisconsin, based on service of process upon one partner, in proceedings commenced before the appointment of a receiver of the firm assets, bound the receiver, being conclusive on the parties to the action and their privies.

13. CONFLICT OF LAWS—PRIVATE INTERNATIONAL LAW—COMITY.
The exception to the rule of comity between courts of dif-

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ferent States whereby citizens of the forum are protected as against residents of another State, *held*, not to be involved.

Appeal from Kalamazoo; Knappen, J. Submitted January 12, 1914. (Docket No. 57.) Decided April 7, 1914.

Bill by Arthur W. Rickman against Alfred G. Rickman and others for the voluntary dissolution and winding up of George Rickman Sons' Company, a copartnership. From a decree for claimant Thomas M. Robinson, the Michigan Trust Company, receiver, appeals. Affirmed.

Alfred J. Mills and *Clapperton, Owen & Hatten*, for appellant.

Floyd A. Wilson, for appellee.

STONE, J. This case is here upon the appeal of the Michigan Trust Company, receiver, in the special matter of the claim of Thomas M. Robinson. In the statement and consideration of this case the dates of the several steps and proceedings are important.

On September 27, 1910, a bill was filed in the circuit court for the county of Kalamazoo, in chancery, by the above-named complainant, against the above-named defendants, who were the other copartners of George Rickman Sons' Company, for the dissolution of said copartnership and an accounting. On the same day the following consent order, duly entitled, was made by the said court:

"*First.* That the Michigan Trust Company, a Michigan corporation, having its principal business office at the city of Grand Rapids, Mich., and being authorized by law to act as such, be and is hereby appointed temporary receiver of all and singular the assets and property of said copartnership firm, with full power and authority to take possession of each, every, and all thereof, to conserve and control the

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same, to manage and conduct the business heretofore carried on by said copartnership, to collect and receive the moneys due and owing to said copartnership or to said receiver and out of said receipts to pay the expenses of prosecuting said business, of maintaining and conserving the properties of said firm and such dividends to the creditors of said copartnership as the court, from time to time, shall direct, and such receiver shall have authority to buy such material as may be necessary in the usual course of trade to carry out the purposes of its appointment, and said receiver shall also have all the usual powers of a receiver appointed by a court of chancery in partnership cases.

* * * * *

"*Third.* It also appearing to the court that the copartnership, as part of its assets, has certain uncompleted contracts for public and private buildings, which it is for the interest of all concerned to complete and finish. It is further ordered that the receiver be and is authorized and empowered to enter upon the completion of said contracts and for that purpose to use any and all money or funds coming into its hands from the copartnership, or from said contracts, to that end until the filing of the report required by this order, and the further order and direction of this court, and in the meantime to borrow upon the faith of the property of said copartnership temporarily of such sums of money as it may find to be absolutely necessary for said purpose.

"*Fourth.* All moneys borrowed by said receiver pursuant to this order shall be evidenced and secured by receiver's certificates approved by this court as to the form thereof.

"*Fifth.* The receiver shall proceed to make an accurate inventory of the assets and effects of said copartnership and notify the creditors, so far as it shall be able to ascertain same, of the pendency of this suit and its appointment to said receivership. The receiver shall also examine into the condition of all of said contracts, and within 30 days after the entry of this order file with this court the said inventory, a list of the creditors of said copartnership and the amount of their demand, as claimed by them respectively, so far as the same can be ascertained by it, and also a full report showing the situation and con-

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dition of the copartnership assets, the business carried on by it, the said contracts, and make such recommendations to the court concerning same and the future conduct, management, and disposition of same as it shall deem or be advised is necessary and proper to give the court and all concerned detailed information of the assets and condition of said copartnership and its property and assets, to the end that the court may then make such further or other order in the premises as it may deem to be necessary or expedient.

"*Sixth.* The appointment of said receiver shall take effect on the filing of an acceptance, in writing, by the said Michigan Trust Company, containing an undertaking on its part for the faithful discharge of the duties of its appointment, and for the accounting of all moneys and effects received by it, as such receiver, and such appointment shall continue until the entry of the final decree in this cause, or until the further order of this court in the premises.

"*Seventh.* The written consent of the said defendants to the appointment of said receiver and the entry of this order shall be filed with the register of this court.

"*Eighth.* The parties to this cause, or any other party, or parties, in interest, are given leave to apply to the court at any time for any other or further grant of power to the said receiver, or for such other order respecting the conduct of said receivership as circumstances may render advisable or necessary."

On the same day an acceptance of appointment, duly entitled, was filed by the Michigan Trust Company.

It appeared in evidence at the hearing that all creditors of said copartnership were immediately notified by the following letter of the appointment of the receiver:

"GRAND RAPIDS, MICH., Sept. 29, 1910.

"TO THE CREDITORS OF GEORGE RICKMAN SONS' COMPANY, OF KALAMAZOO, MICHIGAN.

"*Sirs:*

"The undersigned was on the 27th day of September, 1910, appointed temporary receiver of the assets of George Rickman Sons' Company, a partnership, by the circuit court for the county of Kalamazoo, Michi-

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gan, in a suit brought by Arthur W. Rickman, one of the partners, against the remaining members of the firm of George Rickman Sons' Co., for a dissolution of partnership.

"We have accepted the trust, and have taken possession, but have not had opportunity to take an accurate inventory of the assets. We will immediately give the affairs of this firm a thorough investigation, and expect to advise creditors of the exact condition in as short a time as possible.

"The assets and liabilities as stated by the members of this firm to us, are as follows:

"The Rickman Hotel, at Kalamazoo, which is an eight-story hotel erected about two years ago, now the best hotel in Kalamazoo, and enjoying a very profitable business, valued at $135,000 to $150,000. Two large flat buildings in Kalamazoo, valued at $25,000 to $28,000.

"In addition to this, they claim amounts due on building contracts completed and nearly completed, about $74,000. Also other general accounts receivable, of which we have not had definite statement.

"As against these assets, there are real estate mortgages of $62,000, general unsecured liabilities of about $80,000, and amount necessary to complete contracts estimated at $30,000. Upon these figures, which we have not yet been able to verify, this firm would seem to be amply solvent, and it is claimed that their present embarrassment is entirely due to the action of certain creditors in endeavoring to force claims by lien proceedings against the buildings under construction, and to the fact that their other assets are such as not to be immediately available in their business, and the action taken has been with the idea of obtaining financial assistance necessary to enable them to complete their contracts and realize the amounts due thereon.

"It will be of great assistance to us in our investigation if creditors will send us itemized statement of their claims, so that we can ascertain exactly the amount of liabilities. This statement need not be sworn to.

"If any of the indebtedness is in the form of promissory notes, we would like a statement of these notes, with date of execution and of maturity.

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"We trust that you will assist us in this matter, and that we may promptly hear from you.

"Very respectfully,

"THE MICHIGAN TRUST COMPANY,

"By GEORGE HEFFERAN, Secretary."

The firm of George Rickman Sons' Company consisted of four members (the parties to this suit). It was the principal contractor in the year 1910 for the erection of a courthouse for Oneida county, at Rhinelander, Wis., and also for the erection of the Owosso postoffice at Owosso, Mich.; the Holland city hall at Holland, Mich; a high school building at Chelsea, Mich.; and the Masonic Temple at Flint, Mich. The claimant, Thomas M. Robinson, was one of the subcontractors in the construction of said courthouse at Rhinelander, Wis., and was also one of the subcontractors in the construction of the above-mentioned buildings in Michigan.

The following subcontractors for the building and construction of the said courthouse brought suit in the circuit court for said Oneida county, against above-named complainant and defendants as copartners and said Oneida county jointly, the time of the several proceedings in each of the said suits being as follows:

"(*a*) Saginaw Sheet Metal Works, a Michigan corporation. Summons issued August 25, 1910, served upon said Oneida county at 4:30 p. m. on August 25, 1910; served upon balance of defendants by personal service upon said Arthur Rickman, one of the said defendants, at Rhinelander, said Oneida county, August 25, 1910. Judgment was rendered November 1, 1910, against the said above-named complainant and defendants composing said copartnership, and against said Oneida county, in the sum of $1,250.72 damages and $29.80 costs. Judgment and costs ($1,280.52) paid plaintiff November 15, 1910.

"(*b*) Thomas M. Robinson, of Michigan. Summons issued August 25, 1910, and served upon said Oneida county at 4:21 p. m., August 25, 1910, and

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upon the balance of said defendants by personal service upon said Arthur Rickman, at Rhinelander, said Oneida county, on August 25, 1910. Judgment was rendered November 1, 1910, against said above-named complainant and defendants composing said copartnership and against said Oneida county, in the sum of $2,965.26 damages, and $28.82 costs. Judgment and costs ($2,994.08) paid plaintiff (above claimant) November 15, 1910.

"(c) Union Foundry Works, an Illinois corporation. Summons issued August 25, 1910; served upon said Oneida county at 4:22 p. m., and upon the balance of said defendants by service upon said Arthur Rickman, personally, at Rhinelander, said Oneida county. Judgment was rendered November 1, 1910, against said above-named complainant and defendants, composing said copartnership, and against said Oneida county in the sum of $2,406.51 damages and costs.

"(d) Scott-Taylor Company, a Wisconsin corporation, of Ashland, Wis. Summons issued August 25, 1910, and served upon said Oneida county at 4:23 p. m. on said day, and upon the balance of said defendants by personal service upon said Arthur Rickman, at Rhinelander, said Oneida county. Judgment was rendered November 1, 1910, against said complainant and defendants, composing said copartnership, in the sum of $909.37 damages and costs, and against said Oneida county in the sum of $307.86.

"(e) Wheeler-Blaney Company, a Michigan corporation. Summons issued November 24, 1910; served upon said Oneida county at 3:45 p. m. on said day; no service being made upon balance of defendants. No further steps taken to secure judgment."

At the time (August 25, 1910) these suits were commenced, there was due said copartnership from said Oneida county, on estimates for work done on said courthouse, the sum of $6,998.97.

The sections of the statutes under which the suit of claimant, in Wisconsin, was brought are sections 3328 and 2884 of the Laws of Wisconsin, Revision of 1898, and are as follows:

"SEC. 3328. Any subcontractor who has done work

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or labor, or furnished materials to any principal contractor for the construction, repair or removal of any building or machinery for any county, town, city, village, or school district, may maintain an action therefor in the county in which such work, labor or materials were done or furnished, against such principal contractor, and such county * * * jointly, for the recovery thereof; but no judgment shall be rendered against any defendant therein, other than such principal contractor for any amount greater than the amount due from it to such principal contractor at the time of the commencement of such action. Such county * * * when served with the summons in any such action, may give notice thereof to such principal contractor, and on so doing, need not further defend such action. On rendition of judgment in such action against such principal contractor, the court may also render judgment against such county * * * for the amount due from it to such principal contractor, at the time of the commencement of such action, or to a sufficient amount to pay the judgment recovered against the principal contractor, and payment thereof shall discharge its indebtedness to such principal contractor to the amount so paid. Such principal contractor may, in such action, file in the court in which it is commenced, a bond, in such sum and with such sureties as the judge of such court shall approve, conditioned for the payment of any judgment that may be rendered in such action, and thereupon the liability of such county * * * hereunder, shall cease, and the action as to it shall be discontinued without costs to it."

"SEC. 2884. When the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows:

"1. If the action be against several persons, jointly indebted upon a contract, he may proceed against the defendant served, unless the court shall otherwise direct, and, if he recover judgment, it may be entered in form against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendant served, and, if they are subject to arrest, against the persons of the defendants served.

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"2. In any action against defendants severally liable, he may proceed against the defendant, or defendants, served, in the same manner as if such defendant or defendants were the only parties proceeded against.

"3. If all the defendants have been served, judgment may be taken against any, or either of them, severally, when the plaintiff would be entitled to judgment against such defendant or defendants, if the action had been against them, or any of them, alone."

An exemplified copy of the judgment rendered in Wisconsin in favor of said claimant was offered and received in evidence, and is as follows:

"State of Wisconsin, In Circuit Court, Oneida County.

"Thomas M. Robinson,

"Plaintiff,

"*v.*

"Alfred G. Rickman, Arthur W. Rickman, Peter L. Rickman, and William B. Rickman, Copartners, Doing Business under the Firm Name of George Rickman Sons' Company, and Oneida County,

"Defendants.

"The summons in this action having been personally served upon the above-named defendants, Arthur W. Rickman and Oneida county, on the 25th day of August, 1910, and due proof of such service having been made and filed, and it appearing by proof duly made and filed that after due diligence the above-named defendants Alfred G. Rickman, Peter L. Rickman, and William B. Rickman cannot be found and have not been served, and it further appearing by the affidavit of H. F. Steele, attorney for the plaintiff, that no demand for copy of the complaint, and no answer, demurrer, or notice of appearance, has been served upon or received by him from or in behalf of said defendant Arthur W. Rickman, and that neither said Arthur W. Rickman nor the above-named defendants Alfred G. Rickman, Peter L. Rickman, and William B. Rickman, or any or either of them, have appeared in this action; and this action having come on for trial at this regular term of court on this 1st day of November, 1910, upon the answer of the above-named defendant, Oneida county, H. F. Steele appearing for

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the plaintiff and S. S. Miller for the defendant; and it appearing from the complaint herein, which is duly verified, that the above-named defendants Alfred G. Rickman, Arthur W. Rickman, Peter L. Rickman, and William B. Rickman, as principal contractors, are jointly indebted to the plaintiff herein, as subcontractor, upon the contracts set out in said complaint, and in the amount demanded in same, and that judgment should be rendered in form against all of the defendants last named, and the said defendant Oneida county having, by its answer herein, admitted its indebtedness to the said defendants Alfred G. Rickman, Arthur W. Rickman, Peter L. Rickman, and William B. Rickman jointly, at the time of the commencement of this action, as principal contractors, upon its contract with same, set out in the complaint, in the amount of $6,988.97, and not having denied any of the material allegations of said complaint: Now, on motion of H. F. Steele, attorney for the plaintiff, it is ordered and adjudged that the said Thomas M. Robinson, plaintiff, do have and recover of the said defendants Alfred G. Rickman, Arthur W. Rickman, Peter L. Rickman, and William B. Rickman, and the defendant Oneida county, the sum of $2,965.26, damages, and the sum of $28.82 costs, making in all the sum of $2,995.08; this judgment to be enforced only against the joint property of said defendants Alfred G. Rickman, Arthur W. Rickman, Peter L. Rickman, and William B. Rickman, and the separate property of said defendants Arthur W. Rickman and Oneida county.

"Dated November 1, 1910.

"By the Court:

"A. H. REID, Circuit Judge."

There was no order issued by the circuit court of the county of Kalamazoo, in chancery, in this suit restraining the claimant, or other creditors, from maintaining the suits in Wisconsin. No ancillary receivership proceedings were sought to be brought in said Oneida county, and no receiver, for the said complainant and defendants, as such copartners, or for the property of said copartnership, was appointed in said county or State. No action was taken by said

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copartners, or by the said receiver, to stay the proceedings in said causes in Oneida county, or to prevent the rendition of said judgments.

On November 10 or 11, 1910, and prior to the payment of said judgments in Wisconsin, the attorney for the receiver, and for Henry G. Dykehouse, one of the creditors, went to Rhinelander and there saw H. F. Steele, who was attorney for all of the claimants, who had secured judgments against the Rickman Company and Oneida county jointly. He objected to any payments being made at that time to the judgment creditors by the county of Oneida, to Mr. Steele, and also Mr. Miller, who was a member of the Building Committee of the Board of Supervisors, and at that time served upon Mr. Steele the following notice:

"To H. F. Steele, Rhinelander, Wisconsin, attorney for the Saginaw Sheet Metal Works, Thomas M. Robinson, the Union Foundry Works and Scott-Taylor Company, and all persons represented by you are hereby notified, in behalf of the Michigan Trust Company of Grand Rapids, Michigan, which was on the 27th day of September, 1910, duly appointed receiver of Arthur W. Rickman, Peter L. Rickman, William D. Rickman and Alfred G. Rickman, as copartners, doing business under the name of George Rickman Sons' Company, by the circuit court for the county of Kalamazoo, Kalamazoo county, State of Michigan, for and in the interests of the creditors of said firm and on behalf of Henry G. Dykehouse as a creditor of the said firm of George Rickman Sons' Company, that said firm of George Rickman Sons' Company, is and was at and before the commencement of the suits hereinafter set forth insolvent and had sufficient assets only to pay a percentage upon the debts of said copartnership; and that whereas, on, to wit, the 25th day of August, 1910, suits were commenced in the circuit court for the county of Oneida, State of Wisconsin, one by the Saginaw Sheet Metal Works, one by the Union Foundry Works, one by Thomas M. Robinson, and one by the Scott-Taylor Company against said copartnership, George Rickman Sons' Company and Oneida county, in which said several actions

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judgments were thereafter rendered on the 21st day of October, 1910, and the 1st day of November, 1910, said judgments were docketed by the said clerk of said court on the 3d day of November, 1910, as will appear by the said records and files in said court: You are therefore notified that pending the filing of a petition in bankruptcy in the district court of the United States for the western district of Michigan, southern division, and pending the adjudication of George Rickman Sons' Company to be bankrupt, any payments made by said Oneida county, to said judgment creditors and plaintiffs, will be considered void and will be void as preferences under the bankruptcy act of the United States and that appropriate actions will be maintained by the receiver in bankruptcy and by the trustee in bankruptcy to set aside and declare void all such payments and to recover the amount of said payments from said judgment creditors and plaintiffs and to recover the balance from said Oneida county upon its contract with said firm of George Rickman Sons' Company for the construction of a courthouse at Rhinelander, Wisconsin, out of which the consideration of said claims of said judgment creditors arose."

The said attorney for the receiver represented to the parties addressed in the above notice that unless these judgments were vacated, bankruptcy proceedings would be brought. This statement was made on behalf of the receiver and on behalf of Mr. Dykehouse, the creditor, whom he represented.

Bankruptcy proceedings had not been commenced, and in fact were never brought, but had been discussed at that time, and upon his return to Grand Rapids he wrote Mr. Steele the following letter; payment of the claimant's judgment, however, had been made on November 15, 1910, by the county of Oneida:

"Nov. 16, 1910.

"MR. H. F. STEELE,
"Attorney at Law,
Rhinelander, Wis.

"*Dear Sir:*

"Since my return home I have further considered

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the matter of the claims in the suits of Thos. M. Robinson, Union Foundry Works and Scott-Taylor Co. upon their judgments at Rhinelander. It seems to me that there can be little question but that these judgments do not constitute such a lien as to give them a preference in bankruptcy. While I am ready to file a petition if these creditors stand on their claims I would prefer not to have this additional expense if after conferring with your client you would be willing to release these judgments, and shall therefore wait for your communication in regard to their intention in the matter of these suits. Rather than have the expense of litigation over the matter, as I stated to you at Rhinelander, I would be willing to make some concession. In view of the fact that the affairs of the estates are still in an unliquidated condition, so that we cannot definitely determine the exact amount of assets and liabilities, it would be difficult at this time to make a definite agreement in this regard. If your clients would be willing to wait for thirty days until the affairs of the estate would be worked out more fully we would then be in a better position to determine just how much of a concession we would be willing to make on the settlement of these matters without further litigation. Will you not consider this matter fully and write me at as early date as possible, letting me know your determination in this regard.

"Yours very truly,

"CHARLES M. OWEN."

On January 20, 1911, a decree was entered in the said cause. It found that said copartnership had been engaged in the business of building, and in the management of a hotel at Kalamazoo, known as the Hotel Rickman; that there had been no formal written articles of copartnership; that said copartnership was not agreed to be continued for any definite time, but was terminable at any time at the will of either of said copartners, and that said copartnership was by said decree dissolved; that the interests of said copartners were equal, each having an undivided one-fourth interest in said firm and its assets; that inasmuch as it was necessary in the first instance to

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pay the firm creditors, the court did not, at that time, fix or determine the equities of the copartners between themselves, in the assets of said firm, but ordered that either of said copartners should be at liberty to apply to the court to determine such equities as between themselves, in any surplus that should remain for distribution. From the proofs it appeared that the indebtedness of said firm was then in excess of $200,000, and that it was desirable, in the interest of creditors, to make a sale of the assets of said firm and to liquidate said assets for the purpose of paying the indebtedness of said firm, or such dividends thereon, as it might be possible to pay after satisfying the expenses of the receivership and of the management and conservation of the firm assets and business.

The Michigan Trust Company was by the decree appointed receiver of all and singular the assets and properties of said firm, with full power to take possession thereof, and conserve and control the same, to manage and conduct the business theretofore carried on by said firm, to manage and conduct the operation, and to continue the business of the Hotel Rickman, and to make such agreements and incur such expense as should be necessary for the management, control, and operation of said property, to collect and receive the moneys due or owing to said firm, or to said receiver, or to the temporary receiver theretofore appointed, and out of said receipts to pay expenses of prosecuting the business and management of the several properties of said firm, and such dividends to creditors as the court might, from time to time, direct, and that said receiver should also have all the usual powers of a receiver appointed by a court of chancery in partnership cases.

The appointment was made in succession to the appointment of a temporary receiver, contained in the order made on September 27, 1910, and it was ordered

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that the receiver thereby appointed should succeed to all and singular the rights theretofore possessed by said temporary receiver, and should take and be vested with the title to the choses in action, which had theretofore accrued to said temporary receiver in the conduct of the business carried on by it, with power to confirm and ratify such agreements, with reference to the management and control of said assets and property as should have been entered into by said temporary receiver, and to carry out and perform said agreements; the appointment thereby made was to take effect on the filing of an acceptance in writing by the Michigan Trust Company, containing an undertaking on its part for the faithful discharge of the duties of its appointment, and to account for all moneys and effects received by it as such receiver, and such appointment was to continue until the further order or decree of the court.

The creditors of said firm were, by said decree, required to exhibit their demands by filing proofs of their respective claims in the office of the register of the court. It provided that said receiver should, within 10 days from the date thereof, give notice thereof by mail to each creditor of said firm known to said receiver, and within 90 days thereafter should make and file with the court proof of service of such notice; the notices served should require all creditors to prove their debts and claims within 90 days from the date thereof, by a proof of claim to be filed in said register's office, or, in default thereof, the receiver would proceed to distribute said estate as soon as practicable thereafter, without reference to claims not proved when dividends were paid; notice requiring the creditors of said firm to exhibit their demands by filing proofs thereof in said register's office within the period aforesaid should also be given by said receiver by publishing such notice once a week for six

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successive weeks in the Kalamazoo Evening Telegraph.

Said decree also required that a list of said creditors (so far as known to said receiver), should be filed by it, with proof of service of the notice given by mail as aforesaid; that every proof of claim filed as aforesaid should be itemized as sworn to, and should state the actual amount unpaid and owing, the actual consideration thereof, when the same was contracted, and when the same had or would become due, whether any and what payments had been made thereon, that the sum claimed was justly due from said firm to the claimants, and that the claimant had not, nor had any other person for his use, received any security or satisfaction whatever, other than that by him set forth.

The decree provided that the receiver, or either of the parties to the cause, might contest any claims filed as aforesaid; that every creditor desirous of having a claim filed by any other creditor contested might, by writing, request the receiver to contest such claim, whereupon it should be the duty of said receiver to investigate, and, if in its opinion it was deemed best so to do, such contest might be made in such manner as should be thereafter determined by the court.

The receiver was directed to cause an inventory of the property coming to its hands to be made, with an appraisement thereof, by two disinterested appraisers to be chosen by it.

By the decree the parties to the cause, said receiver or any other party in interest, were given leave to apply to the court at any time for any other or further grant of power to the receiver, or for such other or further order respecting the conduct of said receivership, or the properties embraced therein, as circumstances might render advisable.

In compliance with said order the claimant filed

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proof of his claim, showing balance due on contract for material furnished for normal school building at Kalamazoo; for material furnished for high school building at Chelsea, Mich.; for balance for material furnished for city hall building at Holland; balance for work, labor, and material furnished for Owosso postoffice; balance for work, labor, and material furnished for Masonic temple, Flint, Mich., with interest in each instance; also balance on unpaid note given April 24, 1910, to apply on the Holland city hall contract, and credited as payment thereon, with interest at 6 per cent. After the proof of claim was filed, various credit items were allowed by claimant, and payments were made to claimant. At the time of the hearing the amounts due were as follows:

Balance due on Holland city hall contract, with interest thereon from March 1, 1910..	$1,055 84
Balance due on Chelsea high school contract, with interest thereon from March 1, 1910..	465 32
Balance due on said unpaid note, with interest due as shown on said note.....	500 00
Total.....	$2,021 16

The record further shows that the list of claims filed by creditors shows that on accounts amounting to between $4,000 and $5,000 no interest whatever was claimed; that on other items interest was claimed from various times. One or two items of interest was claimed from 1908. The majority of the items bore interest from 1910. On $16,000 of the claims interest was claimed from 1912. It further appeared that said firm was insolvent, that the receiver, under the direction of the court, has declared and paid a dividend of 20 per cent. to creditors, and that no more than an additional dividend of 20 per cent. will be realized and be available for distribution among creditors.

The objection of the receiver, appellant, to the allowance of the claim of claimant filed in said cause was as follows:

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"It objects to the claim of Thomas M. Robinson, who has filed a claim herein for $4,233.03 for the reason that after the appointment of the receiver herein, and with full knowledge thereof, said Thomas M. Robinson recovered a judgment against said copartnership and against the county of Oneida, Wis., for the sum of $2,994.08, on the 1st day of November, 1910, at which time said Thomas M. Robinson was a creditor of said copartnership; that afterwards said Thomas M. Robinson received from said county of Oneida the sum of $2,994.08, due from said county of Oneida to said copartnership, and thereby received a preference over the other creditors, whereby it is inequitable that said Thomas M. Robinson should share in the dividends declared by this estate until the amount of dividends declared and distributed in this estate on the total amount of the claim of said Thomas M. Robinson, including said judgment, should amount to said sum of $2,994.08."

The matter came on to be heard upon the petition of the receiver, setting forth its objections to various claims of creditors which had been filed, including that of claimant, and asking for an order setting a date of hearing of said claims after due notice to the claimant. Such hearing was finally had on December 28, 1912, and an order was made by the court below allowing the claim of said claimant in full for the whole amount claimed by him against said estate at the sum of $2,021.16, and an order was made February 19, 1913, of which the following is the substance, after entitling the court and cause, to wit:

"In the Matter of the Claim of Thomas M. Robinson and Saginaw Sheet Metal Works.

"After hearing the evidence in support of and against the claim of said claimants, it is hereby ordered, adjudged, and decreed that each of said claimants is entitled to share in any dividends declared, without any deductions being made for payments received by them from said fund under said judgments rendered in Wisconsin; each of said claimants is entitled to and is hereby allowed a solicitor fee of $25 and costs amounting to $10 each, in said

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matter. The amount of the claim of Thomas M. Robinson should be $2,021.16, * * * with interest as shown in the proofs of the respective claimants."

Later, and on the 17th day of March, 1913, a decree was made and filed in said cause, which contains the following language:

"*First.* That the amount of the claim of said Thomas M. Robinson herein is fixed and determined by this court in the sum of $2,021.16, with interest thereon at the rate of 5 per cent. per annum on the sum of $1,055.84 from May 1, 1910, and on the sum of $465.32 from March 1, 1910, and with interest on said unpaid note of $500 at the rate specified in said note from the date thereof.

"*Second.* That the Michigan Trust Company, receiver, heretofore appointed in this cause, shall, from the funds in its possession as such receiver, pay to said claimant Thomas M. Robinson a dividend on his claim of equal percentage to that paid other claimants herein whose claims were not contested.

"*Third.* That the said receiver shall, from the funds now or hereafter coming into its possession as such receiver, pay to said claimant Thomas M. Robinson a dividend on the interest due on his claim equal in percentage to that paid under the second paragraph herein.

"*Fourth.* That the said receiver shall, from the funds in its possession, or hereafter coming into its possession as such receiver, pay to the said claimant Thomas M. Robinson, a solicitor fee of $25 and costs in the sum of $10."

Upon the hearing the attorney for claimant was called as a witness by the receiver, and gave certain testimony relating to his information concerning the financial condition of the firm at and before the time suit was begun in Wisconsin. His testimony tended to show that, while a notice had been served upon the Wisconsin attorney representing the claimant, as above set forth, in which it was stated that at and before the commencement of the suits in Wisconsin said firm was insolvent, and had sufficient assets only

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to pay a percentage upon the debts of said copartnership, he made investigation and was unable to verify such statement, as the assets and liabilities of the firm at that time were not known, but were by him supposed to be sufficient to pay in full the debts of the copartnership. From which order and decree, so far as they allowed the claim of said Robinson, the receiver has appealed to this court.

By its brief the appellant and receiver claims without conceding the validity of the judgment obtained by claimant in the Wisconsin court, but assuming for the purposes of argument that it was regular, that the claimant is not entitled to the relief he prays, and that he should receive no dividends until the total dividends in said estate would on his claim, including said judgment, exceed $2,994.08. The appellant's argument, contained in the brief of its solicitors, proceeds upon the following propositions:

(1) The receiver could have enjoined the Michigan creditors from proceeding to judgment in the Wisconsin court; (2) the claimant Robinson is in contempt, and does not come into court with clean hands; (3) as to whether a lien existed under the Wisconsin statute; (4) as to whether a lien on this fund was created by the Wisconsin statute from the fact of its being in the nature of a garnishment; (5) substituted service; (6) the rule of comity is subject to the rule that the courts of each State will first protect the citizens of that State, as against residents of another State.

1. It is the claim of appellant that, by virtue of its appointment as receiver, it was vested with the right, as against all the creditors of the firm of George Rickman Sons' Company, resident of the State of Michigan, to take possession of and administer, under the direction of the court, all the assets and property of that firm located in the State of Michigan, or elsewhere, except as against the rights and equities of creditors resident in States other than Michigan, in

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which the same might be situated. It is a significant fact that should not be lost sight of that no bankruptcy proceedings have ever been instituted against said firm; that as early as the 25th day of August, 1910, suit had been commenced by the claimant against said firm and Oneida county in the circuit court of Oneida county, State of Wisconsin, and that service was had on that day upon Arthur W. Rickman and Oneida county.

If it shall turn out that the commencement of this suit operated as a garnishment of the fund in Wisconsin, and that such garnishment operated as a lien in favor of the claimant upon that fund, then we do not think the authorities cited by appellant upon this proposition are applicable here. The Michigan cases cited by counsel, of *Butler* v. *Wendell*, 57 Mich. 62 (23 N. W. 460, 58 Am. Rep. 329), and *Cohen* v. *Order of the Iron Hall*, 105 Mich. 283 (63 N. W. 304), are readily distinguished from the instant case, in the event that claimant, by the above-mentioned proceedings, obtained a lien upon the fund in Wisconsin.

Counsel also call attention to the case of *Gilman* v. *Ketcham*, 84 Wis. 60 (54 N. W. 395, 23 L. R. A. 52, 36 Am. St. Rep. 899). That case is readily distinguished from the instant case for many reasons. In that case there was a voluntary proceeding for the dissolution of a corporation of another State, and a receiver had been appointed by a court of that State, and the creditors had been enjoined from prosecuting actions against the corporation. The Wisconsin court said:

"The situation, in brief, is that after the plaintiff had been enjoined, by a competent court of the jurisdiction in which he resided, from bringing any action against the corporation, * * * and after an adjudication absolutely dissolving the corporation had been made, and after the title to its property, effects, and credit had been vested in the claimant

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as such receiver, the plaintiff came into the circuit court of this State, and commenced an action to recover his demand against a dissolved corporation."

We are dealing here with a case in which the claimant had commenced his suit more than a month before the bill of complaint was filed in this cause. It should be noted that the bill of complaint was filed to dissolve a copartnership and for an accounting, and not to wind up a corporation; also that no injunction had been issued, or action taken by the receiver to interfere with the progress of the suit in the State of Wisconsin. The claimant had in no way been made a party to the chancery suit commenced in the Kalamazoo circuit. So far as the record shows, at that time the copartnership was supposed to be solvent, and there seems to have been no reason why the claimant might not proceed to enforce his lien in the State of Wisconsin upon the money there intended for the payment of the claims. Under such circumstances, we do not believe the receiver could have enjoined the Michigan creditors from proceeding to judgment in the Wisconsin court. *Merchants & Manufacturers Nat. Bank* v. *Kent Circuit Judge,* 43 Mich. 292-297 (5 N. W. 627); *Baldwin* v. *Wayne Circuit Judge,* 101 Mich. 119-134 (59 N. W. 432); *Baldwin* v. *Wayne Circuit Judge,* 101 Mich. 432 (59 N. W. 669).

An injunction should not issue at the suit of a receiver to enjoin a creditor, who has garnished funds of the corporation, from proceeding with his suit.

If claimant had obtained a valid lien on the fund, it was not dissolved by the filing of the bill and the appointment of a receiver, but may be enforced.

It will be noted, also, that there were a number of suits pending in the Wisconsin court, including Michigan, Illinois, and Wisconsin creditors. The result of an injunction would have been to deprive the Michigan creditor of his remedy and lien there, leaving the field open for the Illinois and Wisconsin creditors to

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exhaust the fund, for, as it turned out, the fund was not large enough to pay all of the claims in full, but the judgments were paid in the order in which the suits were begun. Under such circumstances an injunction would not have been issued. *Washington Lodge* v. *Frelinghuysen,* 138 Mich. 350-355 (101 N. W. 569); *Campau* v. *Film Co.,* 159 Mich. 169-172 (123 N. W. 606).

It seems to us that the receiver bases its entire theory on the assumption that it made no difference whether the suits in Wisconsin were begun prior to the appointment of the receiver, or subsequently. We think there is a marked difference, and that a different rule should be applied. This court has held that, *after* the appointment of a receiver for an insolvent, the right of a creditor to sequester property by attachment, and thus gain priority, is suspended. *Butler* v. *Wendell,* 57 Mich. 62 (23 N. W. 460, 58 Am. Rep. 329). There the assignment was made prior to the commencement of the garnishee proceedings, and was valid in the State where made. See, also, *Cohen* v. *Order of the Iron Hall,* 105 Mich. 283 (63 N. W. 304). There the receiver was appointed in Indiana, and on the same day suit was commenced in Michigan and an ancillary writ of garnishment was issued. This court said, at page 288 (63 N. W. 306):

"If it be conceded that the prior appointment of a receiver by the Indiana court would have relegated plaintiff to that court, it does not appear, under either rule, that such appointment preceded the commencement of the present suit. We are of the opinion that under the rule laid down in *Granger* v. *Circuit Judge,* 27 Mich. 406 [15 Am. Rep. 195], the pendency of the proceedings in the Indiana court did not deprive plaintiff of his remedy at law."

2. We do not agree with appellant's contention that claimant Robinson was in contempt of court in proceeding to take his judgment in the Wisconsin court.

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At that time it did not appear that the copartnership was insolvent, nor had any legal steps been taken to invoke bankruptcy proceedings, or to restrain claimant from proceeding to enforce his lien.

This court held in *Baldwin* v. *Wayne Circuit Judge*, 101 Mich. 119-134 (59 N. W. 432), that proceedings for contempt are not appropriate for the trial of issues involving a right to a fund as between receiver and a garnishee of the fund. See, also, Alderson on Receivers, §§ 211-219.

The case of *Campau* v. *Driving Club*, 130 Mich. 417 (90 N. W. 49), is readily distinguished from the instant case.

3, 4. The third and fourth propositions may well be considered together. We agree with the contention of the claimant that the commencement of the suits in Wisconsin by the four subcontractors gave each a lien on the fund then owing by the county to the copartnership, with priority of payment in the order of time when such suit was begun. Thus the supreme court of Wisconsin has interpreted the statute which we have already quoted, and has held that the action under this law is equivalent to a garnishment proceeding. We think that the commencement of such actions gave the plaintiffs therein priority over subcontractors and creditors of the principal contractor who might begin their actions later. *James* v. *Davidson*, 81 Wis. 321 (51 N. W. 565). In the case last cited that court said:

"These actions, under section 3328, Revised Statutes, are the equivalents of garnishee actions brought by the same creditors of *Russell* v. *County*" —citing *Klaus* v. *Green Bay*, 34 Wis. 628, and continuing:

"The commencement of each such action gave the plaintiff therein priority over subcontractors and creditors of Russell who commenced their actions later. This plaintiff, being the first to bring an action, is entitled to be first paid out of the moneys adjudged

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to have been due Russell from the county when the action was commenced."

In the suits of the four claimants in Wisconsin the Oneida circuit court carried out the same principle. The amount impounded was not sufficient to pay the claims of all four creditors who had filed suits. The judgments of these four creditors were paid in the order of time in which these suits were filed, and the Scott-Taylor Company, a Wisconsin corporation, being the last claimant to file suit, did not receive payment of its judgment in full from the partnership assets so impounded. The judgments not only established the fact that each claimant had a lien, with priority of payment in the order in which the suits were begun, but also that foreign creditors who commenced suit prior to the Wisconsin creditors were entitled to payment from the fund, even to the depletion of the fund, so that the local Wisconsin creditor did not receive payment of its judgment in full.

It is urged by appellant that the language of the statute is permissive only, in that it is said, "that a court may render judgment." The Wisconsin courts have held that the exercise of the statutory power which is permissive only in form is not discretionary where public interests or individual rights call for its exercise. *Brawley* v. *Mitchell*, 92 Wis. 671 (66 N. W. 799), citing many cases. This is also the general rule. See 2 Lewis' Sutherland Statutory Construction (2d Ed.), § 636, pp. 1149, 1150. This court should follow the construction placed upon these statutes by the Wisconsin courts. *Id.*, vol. 1, § 13, p. 22; 36 Cyc. p. 1104; Black on Interpretation of Laws, § 145, p. 381.

It should be remembered that in this case a bill was filed by one copartner for the dissolution of the partnership and an accounting from the other copartners. By consent a temporary receiver was ap-

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pointed to carry on the business of the copartnership until the cause could be heard. Such receiver was not entitled to possession of the fund impounded, over a month before, by the suits commenced in Wisconsin. High on Receivers (4th Ed.), § 539, p. 704; *Weber* v. *Weber*, 90 Wis. 467 (63 N. W. 757).

"The receiver of a partnership takes only its rights, and consequently is affected by all claims, liens and equities which would prevail against the partnership if it were asserting its interest in the property." Alderson on Receivers (1905), p. 223.

The receiver takes only such title as the partnership had, subject to all valid or existing liens thereon. Alderson on Receivers (1905), p. 658.

Claimant having obtained a lien on the fund, the receiver is not entitled to possession of the same. *Baldwin* v. *Wayne Circuit Judge, supra; Brownson* v. *Roy*, 133 Mich. 617 (95 N. W. 710).

The doctrine is well stated in 23 Am. & Eng. Enc. Law (2d Ed.), pp. 1091-93, as follows:

"The appointment of a receiver for property does not affect pre-existing liens upon the property, or vested rights or interests of third persons therein. * * * A receiver, it is held, succeeds to only such right, title, and interest in the property as the individual or corporation for which he is appointed receiver had at the time the appointment was made. The receiver takes his title to the property subject to all the equities to which it was subject in the hands of the debtor"—citing many cases.

Where property of the debtor is subject to a lien prior to the time of commencement of receivership proceedings and appointment of receiver over all of debtor's property, the receiver is not entitled to possession of the property, and the lienor can enforce his lien as against the property.

An abundance of authority may be cited in support of this doctrine outside of this State. We have already cited sufficient authority upon the subject.

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That the lien attached on the filing of the suits in Wisconsin there can be no question under the authorities which we have cited. The receiver in Michigan was appointed subsequent to the commencement of the Wisconsin suits, but prior to the time of judgment. Under such circumstances the plaintiffs in the Wisconsin suits were entitled to proceed with these suits and hold the fund subject to their liens. The money impounded in Wisconsin may be said to have been a fund for the satisfaction of such liens. *Baldwin* v. *Wayne Circuit Judge, supra.* The same rule is laid down in the case of *Ross* v. *Titsworth,* 37 N. J. Eq. 333.

It will be noted that in the case we are considering the court below did not make a decree dissolving the copartnership and ordering creditors to file their claims until January 20, 1911. In the meantime claimant's Wisconsin judgment had been paid. Until this decree was entered it cannot be said that the claimant was in any sense a party to the litigation, or affected by it in so far as the proceedings in Wisconsin were concerned.

The doctrine of the Wisconsin court that the service of garnishee process creates a lien upon the property of the principal defendant in the hands of the garnishee defendant, entitling the plaintiff to hold such property for the satisfaction of his claim, is the general doctrine. In addition to the cases already cited, we may cite that of *Bethel* v. *Judge of Superior Court,* 57 Mich. 379 (24 N. W. 112); 20 Cyc. p. 1063; Rood on Garnishment, §§ 180, 192, 193, 194.

5. **Substituted Service.** The receiver contends that as personal service was had on only one of the copartners in Wisconsin, and no service was had on the other copartners, the judgment obtained in Wisconsin against the copartnership property will not be recognized. It should be borne in mind that the

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claimant in these proceedings is not seeking to enforce his Wisconsin judgment against any partnership assets in Michigan, or against the separate property of any of the copartners not served. The Wisconsin judgment was satisfied out of the funds impounded there. The only use made of such judgment in this proceeding is to establish the fact that claimant had, through suit, secured a valid lien on the fund in Wisconsin, out of which fund his judgment was paid. His claim filed in this suit is on entirely different matters arising out of construction work done by him as subcontractor of various contracts in Michigan. The Wisconsin statute which we have quoted, being section 2384, is substantially like our sections 10371-10374, 3 Comp. Laws. It has been held that where one of several copartners has been served with process, the copartnership property is liable. *Gunzberg* v. *Miller*, 39 Mich. 80; *Smith* v. *Runnells*, 94 Mich. 617 (54 N. W. 375).

Claimant was proceeding to impound the partnership funds in Wisconsin. There is no question that under the laws of that State, the Wisconsin court had jurisdiction to render the judgments against the fund which it did render, and, therefore, the receiver representing the partnership is in no better position than the partnership would be to contest the validity of such judgments. We think the judgment in that court is conclusive upon the parties to the action and their privies. *Mitchell* v. *Chambers*, 43 Mich. 150 (5 N. W. 57, 38 Am. Rep. 167); *Eureka Iron & Steel Works* v. *Bresnahan*, 66 Mich. 489 (33 N. W. 834); *Dunlap* v. *Byers*, 110 Mich. 109 (67 N. W. 1067); *Spiker* v. *Relief Society*, 140 Mich. 225 (103 N. W. 611, 104 N. W. 670).

6. We do not think that the comity rule is involved in this case. We have, in our opinion, said enough to dispose of the case.

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We find no error in the order and decree of the lower court, and the same are affirmed, with costs to the claimant.

McALVAY, C. J., and BROOKE, KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

HUDDLESTON v. CHARLES AMOS & CO.

1. JUSTICES OF THE PEACE—PETITION FOR APPEAL—DELAY.
   Under the provisions of Act No. 475, Local Acts 1903, providing for appeals from justice's court in Wayne county after the lapse of five days from the date of judgment, it was proper to deny defendant's motion for leave to appeal, upon a showing that the officers of defendant corporation knew a suit had been commenced, and process was regularly served upon the secretary who gave the summons to a subordinate with instructions to hand to the president, the employee failing to carry out the request.

2. MANDAMUS—APPEAL AND ERROR—APPROPRIATE REMEDY.
   The proper remedy to review the refusal of the circuit court to grant an appeal from justice's court after five days have elapsed from the date of judgment, is mandamus, not error; but in the absence of any objection to the form of remedy chosen by appellant the court may pass on the merits of the objections or points sought to be reviewed.

Error to Wayne; Murphy, J. Submitted January 21, 1914. (Docket No. 74.) Decided April 7, 1914.

Trespass on the case in justice's court by Orville Huddleston against Charles Amos & Company, a cor-

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poration, for personal injuries. From an order denying defendant's petition for leave to appeal, it brings error. Affirmed.

Henry C. L. Forler, for appellant.

Thomas L. Dalton, for appellee.

STEERE, J. Defendant seeks in this case to obtain a review and reversal of an order made by the Wayne county circuit court dismissing defendant's petition for leave to appeal, after the expiration of five days, from a judgment rendered against it in a justice's court of said county.

Defendant's assignments of error are:

"*First.* The court erred in dismissing the plaintiff's (defendant's) petition to appeal after the expiration of five days.

"*Second.* The court erred in making an order dismissing the plaintiff's (defendant's) petition, for the reason that the facts do not support such a verdict."

The reasons given in defendant's petition why said leave should be granted are that justice requires it, and that defendant was prevented from taking an appeal within the time allowed through no fault or neglect of its own and by circumstances not under its control.

The action upon which judgment was rendered and from which an appeal is sought was commenced before a justice of the peace of the city of Detroit on May 2, 1913, by a summons returnable May 9, 1913, between Orville Huddleston, plaintiff, and Charles Amos & Co., defendant, to recover damages for injuries received by plaintiff while in defendant's employ. On the return day there was no appearance by defendant, and the cause was adjourned to May 16th, at which time also defendant failed to appear, and, after hearing proofs, judgment by default was rendered for plaintiff in the sum of $500 damages and

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$1.75 costs. A petition for leave to appeal was filed and presented to the court on June 3, 1913, and, after hearing, denied. A second petition, and the one sought to be reviewed here, was presented to the court on June 10, 1913, which was also denied.

The general law relative to appeals from justice's court limits the time for taking appeals from judgments rendered therein to five days, unless the circuit court or circuit judge at chambers shall authorize an appeal after the expiration of that time, where it appears the party desiring to appeal has been prevented from doing so by circumstances not under his control. Analogous to the general law, section 22 of Act No. 475, Local Acts 1903, relative to justices' courts in the city of Detroit, beginning with the prohibition that: "No appeal shall be taken from any judgment of any justice of the peace in said city of Detroit, except in the following cases"—contains the following provision, upon which defendant relies:

"Appeals may be authorized by the circuit court of the county of Wayne, when the party making the appeal has been prevented from making a defense upon the merits of the case in which such appeal is taken by circumstances not under his control; and such appeal may also be authorized when justice requires that such appeal should be authorized."

The fourth and last subdivision of said section, relative to appeals, provides:

"Under absolutely no circumstances shall any appeal be allowed or authorized after five days from the rendition of judgment, except as herein otherwise provided."

The record returned to this court contains the petition supported by affidavits, counter affidavits, and testimony taken before the court at the hearing of said petition. These present certain rather sharply drawn issues of fact for the court to pass upon, if

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the question of whether justice required allowance of the appeal is involved.

The substance of the showing made by defendant, under the claim that circumstances beyond its control prevented its appeal, is as follows: Defendant was a corporation doing business in the city of Detroit; Charles Amos being its president, and Mrs. Charles Amos its secretary. The record only discloses the nature of its business inferentially; it being shown plaintiff was in its employ as a structural ironworker; its board of directors was composed of three members, Amos and wife constituting a majority of said board, and in active control and management of the business, the third member being their attorney; that the summons in this case was served upon Mrs. Charles Amos at the office of defendant while she was in charge, Charles Amos being at that time out of the city; that Mrs. Amos turned said summons over to the bookkeeper, with instructions to deliver it to Mr. Amos on his return, which was neglected; that Mr. Amos first learned of said suit and judgment on the 29th of May, 1913, while searching records in the justice's court, looking up other suits in which defendant was interested.

Against this it is shown that early in the history of the case plaintiff's attorney notified defendant that he was retained and action was contemplated, whereupon he was referred to defendant's attorney, who was also one of the directors, and who, acting for the company, proposed terms of settlement, but a few days later reported defendant had refused to ratify the same and would do nothing in the matter, following which action was begun.

Plaintiff deposed that on the 4th or 5th of May, 1913, he met Mr. Amos, president of defendant, who stated that the attorneys were trying to job the company out of $100, that it had never paid for any one

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getting hurt yet, and he would like to see plaintiff get anything out of it, whereupon plaintiff replied that he had started a suit against the company and he would have a fight on his hands. On his examination at the hearing, Amos testifies as to this notice:

"I met Mr. Huddleston, the plaintiff. He came into our yard and said a suit had been started, but did not say anything else that I remember. That was before the 19th of May, but I could not say the exact date. * * *

"*Q.* You understood the suit had been started at that time?

"*A.* Yes, sir; I understood him to say that."

In regard to this he says:

"I paid no attention to the statement, because I did not think it was necessary to consider anything but a summons into court."

The testimony of Mrs. Amos, the secretary, indicates that she was quite actively connected and familiar with the business of defendant, doing all the estimating, billing, making payrolls, and paying the men. She testifies:

"I was not the general head of the business; I am the efficient head. * * * Mr. Amos has full charge of the business. He has been away three or four weeks at a time, and I have taken care of the business in his absence. * * * In the absence of Mr. Amos, I do the business."

As to her knowledge of the import of a summons, she states:

"I have been served with garnishee summons and have been in court, but never served with any summons. This is the first summons I had ever had."

From the foregoing it appears, uncontroverted, that all the directors of defendant had early notice that this action was imminent, and the president and secretary, its executive officers, that it had actually

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been commenced, in ample time to have appeared and made such defense as was desired. Legal, personal service was duly made on the secretary of defendant in its office, while she was in charge of and conducting its business as "the efficient head." The fact that, instead of putting it in the hands of their attorney, or herself giving it to the president on his return, she turned it over to a subordinate, who neglected to follow her instructions, cannot legally amount to, nor be construed as, a circumstance beyond the control of the company of which she was secretary and a director. The trial court rightly so held, and said: "I cannot deal with the equities; I must deal with it as a matter of strict legal right."

Defendant's counsel urge that such strict construction is not in harmony with the tendency of former decisions of this court which hold the statute relative to appeals from justice's court is remedial in character, and should be liberally construed, citing *Braastad* v. *Mining Co.*, 54 Mich. 258 (20 N. W. 43); *Capwell* v. *Baxter*, 58 Mich. 571 (25 N. W. 493); *Potter* v. *Lapeer Circuit Judge*, 119 Mich. 522 (78 N. W. 536); *Jackson* v. *Jackson*, 135 Mich. 549 (98 N. W. 260); *Pickell* v. *Coates*, 147 Mich. 53 (110 N. W. 125).

Without reviewing them in detail, it can be said of all those cases that they deal with the general statute and none of them presents a state of facts analogous, as a whole, to those disclosed here. While certain of the cases may suggest a liberal construction of the statute, we cannot construe them as authority for the proposition that in passing upon the issue of circumstances beyond defendant's control, the court will vary its findings of facts or circumstances according to disclosed equities. If important to determine here we are not prepared to find that the showing made at the hearing as to the equities is such as to impel a court to grant the appeal because justice requires it.

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In this case we are dealing with the local act relative to justices' courts in the county of Wayne, in which somewhat different and more restrictive language is used than that found in the general act. In *Stock* v. *Wayne Circuit Judge,* 143 Mich. 339 (106 N. W. 897), which also cites previous decisions of this court touching the statute under consideration, it is said:

"The entire provision for appeals bears some evidence of intention to restrict, rather than to enlarge, the right to appeal. Whether the provision of the fourth subdivision does or does not cut off the right to appeal, after five days, in any case and for any reasons, excepting those stated in the third subdivision, we are agreed that no appeal is provided for after five days unless the showing required by 1 Comp. Laws, § 909, is made."

Under the general statute it is held not to have been the intent to confer upon the court unlimited discretion to allow appeal after five days in any case where, in the judgment of the court, it would be equitable, but it must first be satisfactorily established, before the court can go further, that the party desiring to appeal has brought himself within the terms of the statute. *Draper* v. *Tooker,* 16 Mich. 74; *Combs* v. *Saginaw Circuit Judge,* 99 Mich. 234 (58 N. W. 71). Had it been shown to the satisfaction of the court in this case that lack of proper notice, physical causes, or other uncontrollable circumstances, without fault or neglect on the part of defendant, prevented it from appealing within the five days, thus bringing it within the provisions of the statute, then the limited discretion of the court might have been applied, on the showing made as a whole, to determining whether justice required that the dilatory appeal should be granted.

While we have in this instance concluded to consider the ruling complained of on a writ of error, no

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question having been raised in the record as to its propriety, this case is not to be regarded as a precedent, or an indorsement of that remedy in cases where the court has refused to take jurisdiction and denied the appeal.

Where the court has taken jurisdiction and proceeded with the case, the aggrieved party may by proper objection save the question, which can and should be raised by writ of error after final judgment; but where a final order is made refusing jurisdiction, as we have here, mandamus is the appropriate remedy. This distinction should be borne in mind and adhered to. Although it must be recognized that cases are to be found where, objections not being raised, the impropriety of the remedy has been overlooked by the court, on both contingencies.

The converse of the question here presented is discussed and cases cited in *Cosgrove* v. *Wayne Circuit Judge*, 144 Mich. 682 (108 N. W. 361), and *Mikkola* v. *Houghton Circuit Judge*, 165 Mich. 583 (130 N. W. 1118), which hold that a writ of error is the proper course where the circuit court has taken jurisdiction. It is unnecessary to here repeat what is there said or again review the cases there cited.

In *Vincent* v. *Bowes*, 78 Mich. 315 (44 N. W. 276), it is held that where the circuit court denies an appeal and by final order declines to take jurisdiction, such action can only be reviewed on mandamus. In *Capwell* v. *Baxter*, 58 Mich. 571 (25 N. W. 493), and *Pickell* v. *Coates*, 147 Mich. 53 (110 N. W. 125), the question of a final order denying an appeal appears to have been raised by writ of error, and, in the absence of objection, passed upon by this court. It may, perhaps, be said of those cases, as was said of *Stock* v. *Wayne Circuit Judge*, 143 Mich. 339 (106 N. W. 897), in *Cosgrove* v. *Wayne Circuit Judge*, *supra*, "the impropriety of that remedy was not suggested and did not occur to the court." In view of

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the possibility that counsel may have been misled by those cases we have considered the questions raised by this writ, but neither those cases nor this are to be taken as approving authority for the remedy resorted to here.

We conclude that defendant failed to bring itself within the provisions of the statute, and the circuit court rightly denied the appeal petitioned for.

The order of the circuit court is therefore affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

MOORE v. O'LEARY.

1. WILLS—TRUSTS—CHARITABLE TRUST—VALIDITY.
   A bequest of real and personal property to a person named, to be disposed of by the beneficiary for charitable purposes, as the testatrix had previously orally instructed her, was invalid, for the reason that the disposition of property by testamentary act must be by writing and may not be partly oral, and partly in writing.

2. TRUSTS—PARTIES—CHARITABLE USES.
   At common law a trust without a designated beneficiary who could enforce it was void.

3. WILLS—STATUTES—CHARITABLE USES.
   Act No. 122, Pub. Acts 1907, as amended by Act No. 125, Pub. Acts 1911 (4 How. Stat. [2d Ed.] §§ 10700, 10701), validating charitable trusts where there is uncertainty or indefiniteness of beneficiaries, does not, however, make an instrument valid, which is insufficient as a testamentary disposition of property.

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Appeal from St. Clair; Law, J. Submitted January 19, 1914. (Docket No. 77.) Decided April 7, 1914.

Bill by Alexander Moore, as executor of the estate of Alice O'Leary, deceased, against James A. O'Leary and others for the construction of a will. From a decree for complainant, defendants appeal. Reversed.

J. F. Wilson, for complainant.

Lincoln Avery, for defendants.

The issue made by the pleadings involves the legal effect of a clause in the codicil to the last will and testament of Alice O'Leary, deceased. The fourth clause of the will is:

"I bequeath all the residue of my estate and effects whatsoever and wheresoever situated, after payment of my debts, funeral and testamentary expenses, and of the legacies bequeathed by my will unto Mary E. Clary and William J. Denler."

The codicil, so far as its terms are here important, is:

"I desire to eliminate the provision in said will for William J. Denler and leave all property mentioned in clause four of said will to Mary E. Clary, to be disposed of by her as I have heretofore instructed her for charitable purposes and a bequest to St. Stephen's church of Port Huron, Michigan, towards the purchase of an organ."

The record does not disclose how much of the estate of the testatrix is real and how much is personal property, nor, except by inference, the value of the estate. Power is given to the executor to sell and convey all of the estate, "both real and personal." The will was made February 25, 1911; the codicil April 8, 1912. The residue of the estate is said in the briefs to amount to about $12,000. Mary E. Clary was sworn as a witness at the hearing and gave testi-

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mony to the effect that she was not related to the testatrix but had been in her employment and had lived with her for more than 13 years. The testatrix gave her, she says, no written instructions as to a disposition of her property. Witness had a list, made by herself, of various charities, and knew, or was able to learn, what contributions the testatrix had habitually made to them, and some, if not all of them, had been mentioned in conversations between witness and the testatrix as objects of her bounty.

"*Q.* Then previous to the making of this will that is now before the court she had told you that she wanted you to take the residue of her estate and go along and do just as she had done?

"*A.* Yes, and that was as near as what she told me to do, the different places she had told me.

"*Q.* That is to give to charity?

"*A.* Yes, while the money would last."

Concerning the instructions given her by the testatrix, she said she was to give $1,000 towards purchasing an organ for St. Stephen's; about $20 annually, while the money lasted, to the Home for the Aged of the Little Sisters of the Poor at Detroit, Mich.; $10 or more annually, "of course according to the amount on hand," to St. Joseph's Home for Boys at Detroit; the same amount to St. Vincent's Hospital and St. Francis Home for Boys at Highland Park; $20 to St. John's Protectory at Lackawanna, N. Y. A number of other institutions were mentioned, but the foregoing sufficiently illustrates the alleged instructions. About a dollar a day, or $350 a year, was to be paid for masses. This witness also gave the following testimony:

"Well, I would have authority when the courts turned all this property, the residue of the estate, over to me, I was to dispose of it to best advantage, not to be in such a hurry to sell it out at less than its value, and she didn't want this kept in the courts used up that way, the principal or the proceeds of the estate,

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and in that way she left it to me, and I was to just take that and sell out the property according as I had the opportunity, and turn that money in to be used for these purposes, and I was to use it up along every year all that would come into my hands for that purpose.

"*Q.* And the amount you were to advance from year to year why you could, of course, increase it or diminish it if you thought it was a proper thing to do?

"*A.* Yes.

"*Q.* Is that your idea?

"*A.* Yes, in most of the cases I could give more if I had the money on hand.

"*Q.* And if you didn't want to give more you would hold it and give it next year, if you thought it was proper, and hold it up and give it the following year?

"*A.* I can't say as I would be justified in doing that; each year would have to take care of itself.

"*Q.* Now, if some new worthy purpose came along, what would you do with that, if it was similar to some of the institutions she had been giving to while she was here?

"*A.* I suppose if I had the money, extra money on hand, I would have to contribute to that.

"*Q.* If in your judgment it was the proper thing to give it?

"*A.* Yes, sir.

"*Q.* You would feel it your duty to do it under your understanding with her?

"*A.* Yes, sir.

"*Q.* And you would think you would not be doing right unless you did it, would you?

"*A.* No, but I should have to take care of the other ones first that I knew that she had given to.

"*Q.* That is, that you had given to?

"*A.* Yes, sir."

The court determined that the codicil revoking the clause of the will is valid and operative, "creating a gift and bequest for religious, educational, charitable and benevolent uses," and that the title to the residue of the estate vested in Mary E. Clary, as trustee; that the trust shall be executed under and subject to the directions of the circuit court, in chancery, for

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the county of St. Clair, to which court the trustee shall account for all receipts and disbursements in connection with the administration of the trust, and to which court she may apply for orders. To the giving of testimony by Miss Clary, the following objections were made:

"(1) She is interested in the subject-matter.
"(2) Her knowledge is equally within that of deceased and barred by the statute.
"(3) The will and codicil must control as drawn and cannot be changed or added to by oral testimony.
"(4) The objects of the charity rest in parol.
"(5) The testimony is not competent under section 8839, M. C. L. 1897, or P. A. 122, 1907."

And appellants present in this court the following questions:

"(1) Is the codicil, as drawn, an effective disposition of the residue of this estate?
"(2) Must a gift, to be valid, attach itself to a definite charity, on the face of the will?
"(3) Is it necessary to name or designate a beneficiary in a will?
"(4) Can oral testimony be resorted to, to select a particular purpose or charity or name the beneficiaries or amounts, when not expressed in some form or indicated in some manner by the language used in the will?
"(5) Can the court receive Miss Clary's testimony for the purpose of designating beneficiaries and amounts, or to establish a will by oral testamentary disposing of $12,000 worth of property?
"(6) Does Act 122, P. A. 1907, repeal section 8839, M. C. L. 1897, and other statutes, and establish the *cy pres* doctrine in Michigan?"

Act No. 122, Pub. Acts 1907, as amended by Act No. 125, Pub. Acts 1911, is as follows (4 How. Stat. [2d Ed.] § 10700):

"An act relative to gifts for religious, educational, charitable or benevolent purposes or for the maintenance of cemeteries, or anything therein contained.

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"SECTION 1. No gift, grant, bequest or devise to religious, educational, charitable or benevolent uses, or for the purpose of providing for the care or maintenance of any part of any cemetery, public or private, or anything therein contained, which shall in other respects be valid under the laws of this State, shall be invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same, nor by reason of the same contravening any statute or rule against perpetuities. If in the instrument creating such a gift, grant, bequest or devise, there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes, shall vest in such trustee. If no trustee shall be named in said instrument, or if a vacancy occurs in the trusteeship, then the trust shall vest in the court of chancery for the proper county, and shall be executed by some trustee appointed for that purpose by or under the direction of the court; and said court may make such orders or decrees as may be necessary to vest the title to said lands or property in the trustee so appointed.

"SEC. 2. The court of chancery for the proper county shall have jurisdiction and control over the gifts, grants, bequests and devises in all cases provided for by section one of this act. The prosecuting attorney of the county in which the court of chancery shall have jurisdiction and control shall represent the beneficiaries in all cases where they are uncertain or indefinite, and it shall be his duty to enforce such trusts by proper proceedings in the court, but he shall not be required to perform any duties in connection with such trusts in any court outside of this State."

OSTRANDER, J. *(after stating the facts).* The testatrix has not indicated, in her testament, the objects of her bounty, specially or generally, except that St. Stephen's Church of Port Huron is named as a beneficiary, and the purpose of the gift to it, but not the amount of the gift, is stated. No scheme of charity or of charitable distribution is indicated, nor whether individuals or private or public institutions are objects of her bounty. A purpose to devote the residue

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of her estate to charity is indicated, but not a purpose to devote it to charity generally. The trustee nominated in the codicil has been instructed, and therefore the idea of a selection of beneficiaries by the trustee is apparently excluded. It is plain that the intention of the testatrix cannot be ascertained from the will itself, beyond this: That she intended to create a trust and, through a trustee whom she has nominated and has instructed, to devote to St. Stephen's Church and to other charitable purposes the residue of her estate. I think decision may be safely rested here, not because, as is contended by counsel for appellants, the trust attempted to be created does not satisfy the requirements of our statute of uses and trusts, that statute affecting real property only (*Ledyard's Appeal,* 51 Mich. 623 [17 N. W. 208]; *Hopkins* v. *Crossley,* 132 Mich. 612 [96 N. W. 499]), and we might, other objections aside, apply here the doctrine of equitable conversion and treat all of testatrix's property as personalty, but because, in this State, the disposition of property, real or personal, by will must be by writing, attested by two witnesses. The instrument before us is such a writing, but the trust attempted to be created is not contained therein. See *Wilcox* v. *Attorney General,* 207 Mass. 198 (93 N. E. 599, Ann. Cas. 1912A, 833, and note).

I do not mean to hold, and the case does not involve the point, that a valid trust for charitable uses may not now be created by will; the selection of the particular beneficiaries from a class, or according to a charitable scheme, indicated in the will, being left to a trustee or to the court. In such a case it might be said, what cannot be said here, that the intention of the testator was expressed in the will, and the disposition of property attempted was complete.

Counsel for complainant is of opinion, and to this the learned trial court must have agreed, that the statute of 1907 has introduced into the State the doc-

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trine of charitable uses, and that according thereto the trust in question here may be sustained. In this I think he is mistaken, not, indeed, in thinking that the statute has to some extent introduced the doctrine of charitable uses, but in supposing that the doctrine may be invoked to sustain this trust. Except as introduced by this statute, the doctrine has never obtained in this State (*Methodist Church of Newark* v. *Clark*, 41 Mich. 730 [3 N. W. 207]; *Hopkins* v. *Crossley*, 132 Mich. 612 [96 N. W. 499]), whether the trust fund was real estate or was personalty, or the object private or public benefaction. The rule which has been in force here is the rule of the common law, expressed in *Morice* v. *Bishop of Durham*, 9 Vesey, 399, as follows:

"If there be a clear trust, but for uncertain objects, the property that is the subject of the trust is undisposed of; and the benefit of such trust must result to those to whom the law gives the ownership in default of disposition by the former owner."

And as stated in *Levy* v. *Levy*, 33 N. Y. 97:

"A 'charitable trust' is simply an indefinite or uncertain trust—a trust without a beneficiary; and certainly a trust of that description is void by the rules of the common law as it existed at the time of adoption by us, and now exists. If there is a single postulate of the common law established by an unbroken line of decisions, it is that a trust without a certain beneficiary who can claim its enforcement, is void, whether good or bad, wise, or unwise."

See, also, *Tilden* v. *Green*, 130 N. Y. 29 (28 N. E. 880, 14 L. R. A. 33, 27 Am. St. Rep. 487); *Wheelock* v. *American Tract Society*, 109 Mich. 141 (66 N. W. 955, 63 Am. St. Rep. 578); *Stoepel* v. *Satterthwaite*, 162 Mich. 457 (127 N. W. 673); *McPherson* v. *Byrne*, 155 Mich. 338 (118 N. W. 985). I find no decisions of this court which, as respects the rule that the beneficiaries of a trust shall be certain, have distinguished

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between charitable and other trusts. Whether it would have been more reasonable to have excepted from the rule trusts for public charity, the beneficiaries of which must of necessity be uncertain, at least in cases where the gift or bequest was personal property (Perry on Trusts, § 687; *Dodge* v. *Williams*, 46 Wis. 95-98 [1 N. W. 92, 50 N. W. 1103]; *Harrington* v. *Pier*, 105 Wis. 485 [82 N. W. 345, 50 L. R. A. 307, 76 Am. St. Rep. 924]; *Dulles's Estate*, 218 Pa. 162 [67 Atl. 49, 12 L. R. A. (N. S.) 1177]), is a matter about which men may differ in opinion, but, as has been stated, no such exception has been made. What the prevailing rule has been is of interest in determining what change in the law the statute of 1907 has made.

The statute relates only to gifts, etc., to religious, educational, charitable, or benevolent uses, and to those only which are in other respects (except in respect to matters to be remedied by the statute) valid under the laws of the State. No such gift, is the legislative declaration, shall be invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same, nor by reason of the same contravening any statute or rule against perpetuities. I have pointed out that no beneficiary, excepting St. Stephen's Church, is designated in the will, and also that the idea of an indefinite beneficiary is excluded, and the idea of a certain, but not validly declared, beneficiary is included, by the words employed.

It is said our statute was borrowed from New York, where, in 1893, a statute similar, but not containing the provision relative to perpetuities, was enacted, and before its enactment here was construed by the court of last resort of that State. It is urged on the part of complainant that the statute must be considered as adopted here with the meaning and effect given it

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by the New York court. In *Allen* v. *Stevens,* 161 N. Y. 122 (55 N. E. 568), the court considered, in the light of the statute, a clause in a will reading as follows:

"*Tenth.* I give, bequeath and devise all the rest and residue of my property of every kind, personal and real, wherever situate, to my trustees hereinafter named for the purpose of founding, erecting and maintaining Graves Home for the Aged, to be located in the city of Syracuse, in the State of New York. It is intended as a home for those who by misfortune have become incapable of providing for themselves and those who have slender means of support. The institution to be known as the Graves Home for the Aged. I hereby appoint Charles E. Stevens, Rasselas A. Bonta, and Maurice A. Graves for the trustees to execute the above trust. I hereby authorize and empower my executors, or the survivor of them, to rent or sell any part or all of my real estate that I may own at the time of my death. They are authorized to employ a person or persons to have charge of the real estate, to collect rents, make & to repairs, and to pay such sums for compensation as they may deem reasonable and proper.

"After my executors have executed their trust and paid all the legatees provided for in this will they are authorized and directed to convey to the said trustees above named the balance and remainder of my property of every kind to be applied for the purposes above provided, and the said trustees, or the survivor, are authorized to rent or sell all or any part of my real or personal property and to employ such agents as they may deem proper to take charge of the same and pay them such compensation as they deem best."

There was a dissenting opinion, but the provision of the will was sustained. It is said in the majority opinion that:

"Reading the statute in the light of the events to which reference has been made, it seems to me very clear that the legislature intended to restore the law of charitable trusts as declared in the *Williams Case;* that having discovered that legislative enactment had

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operated to take away the power of the courts of equity to administer trusts that were indefinite as to beneficiaries, and had declared a permanent charity void unless the devise in trust was to a corporation already formed or to one to be created, it sought to restore that which had been taken away through another enactment. This is markedly indicated, not only by the absence of details in the statute, which is broadly entitled 'An act to regulate gifts for charitable purposes,' but also in the brevity of the statute, which confers all power over such trusts and trustees on the Supreme Court and directs the attorney general to represent the beneficiaries in cases within the purview of the statute, as was the practice in England. Practical effect can be given to the provision that no devise or bequest shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as beneficiaries only by treating it as a part of a general scheme to restore to the courts of equity the power formerly exercised by chancery in the regulation of gifts for charitable purposes, for, in order to ascertain the class of persons who were entitled to the benefits of the trust, the rule formerly in force must necessarily be invoked by which the court ascertained, as nearly as possible, the intention of the testator, by decree adjudged, who were intended to be the beneficiaries of the trust and directed its administration accordingly."

It is this declaration of the legislative purpose and of amended state policy which counsel for complainant regard as adopted in this State with the adoption of the statute. It ought to be said, perhaps, that the effect of a new statute upon the law and policy of a State depends upon the existing state of the law and the policies theretofore declared. The same law adopted in different States might have a varying effect upon the existing laws and policies of each State. The history of the particular subject in the State of New York has not been repeated in this State. Therefore, the adoption of the particular statute from New York, and the rule relied upon by complainant, are not necessarily conclusive of the effect to be given the

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statute here. In so far as the statute had been applied in New York to particular facts, and its meaning and effect thus determined, we think the rule should be observed, unless our statute and policies dissimilar to those of New York forbid it. The effect of the decision of *Allen* v. *Stevens*, and of cases since decided (*Matter of Griffin*, 167 N. Y. 71 [60 N. E. 284]; *Matter of Graves*, 171 N. Y. 40 [63 N. E. 787]; *Murray* v. *Miller*, 178 N. Y. 316 [70 N. E. 870]; *Rothschild* v. *Schiff*, 188 N. Y. 327 [80 N. E. 1030]; *St. John* v. *Andrews Institute*, 191 N. Y. 254 [83 N. E. 981, 14 Am. & Eng. Ann. Cas. 708]; *Matter of Shattuck*, 193 N. Y. 446 [86 N. E. 455]; *Matter of Cunningham*, 206 N. Y. 601 [100 N. E. 437]), is that, since the enactment of the law referred to, gifts in trust for public charitable purposes are not void for the uncertainty and indefiniteness of the beneficiaries, if the purpose of the trust is defined with sufficient certainty to be carried out by the court. It was expressly held (*Matter of Shattuck, supra*) that it was not the purpose of the act to preserve gifts to private institutions or individuals, and when the selection of the beneficiaries of a trust is left to the discretion of a trustee, subject only to the limitation that they shall be "religious, educational, or eleemosynary institutions," the trust is void, because the word "educational," as used, does not necessarily describe a public or charitable institution, within the meaning of the act. It was said:

"In this will the testatrix, without defining the use to which the income of the trust fund is to be applied, directs generally that it be paid over to such particular ones of certain institutions as in the judgment of the trustee seems advisable. The power of the court to control the trustee is bounded by the directions of the testatrix. It cannot add to or take from the terms of this will properly construed any more than it could if the testatrix had specified by name the particular institutions entitled to the income of the trust fund,

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and she had included among them one or more manufacturing or transportation corporations. The possible devotion of the income of said trust in whole or in part to private use necessarily affects the entire gift and requires that the same shall be held invalid."

It is further pointed out that a school, unless it is a free school, does not come within the enumeration of charities in the statute 43 Elizabeth, chap. 4. Assuming that our statute should have the meaning and effect which were given to the New York law before its adoption here, it is evident that the purpose of the trust we are considering is not defined with sufficient certainty in the instrument creating it to be carried out by the court. There was a time when the English court of chancery would perhaps have seized upon the general statement of the testatrix that the estate was to be disposed of for charitable purposes, have ascertained, as best it could, the intentions of the testatrix or what were her favorite charities, and disposed of the fund in conformity, "as near as may be," with her ascertained desires; in any event, would have disposed of it for charitable purposes. The *cy pres* doctrine was carried to extravagant lengths in some decisions. The subject is treated generally in 6 Cyc. p. 961 *et seq.* A late case *(Blair* v. *Duncan,* 27 App. Cases, 37, decided in the House of Lords in 1901) indicates the trend of modern decisions. In that case a testatrix, by codicil, directed her trustee that, in events which happened, one-half of the residue of her estate should be applied "for such charitable or public purposes as my trustee thinks proper." It was held the direction was void for uncertainty; that the words "charitable" and "public" were used disjunctively; and that the disposition given to the trustee to determine what particular public purposes should be the objects of the trust is too vague and uncertain for any court to administer.

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In my opinion, the trust in question here is invalid: *First,* because it is not evidenced according to law, and the unexpressed will of the testatrix cannot be given expression by parol; *second,* because the intended beneficiaries are not, upon the instrument creating the bequest, uncertain or indefinite within the meaning of the statute.

It follows that the decree must be reversed and a decree entered in this court adjudging the trust attempted to be created by the codicil to the will to be invalid. Appellee may have his actual costs and expenses allowed, as a disbursement, out of the fund. Appellants may, if they choose, have a decree for costs payable out of the fund.

MCALVAY, C. J., and BROOKE, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

TOTH *v.* OSCEOLA MINING CO.

1. MASTER AND SERVANT—INSPECTION—PICK.
   A pick is a simple tool, in common use, and no duty to inspect arises if the tool was reasonably fit in the first instance.

2. SAME—WARNING AND INSTRUCTING SERVANT.
   It is matter of common knowledge that, when rock is struck forcibly with any iron tool, splinters are liable to fly so that an employer is not charged with the duty of warning an experienced miner of the danger.

Error to Houghton; Cooper, J., presiding. Submitted January 22, 1914. (Docket No. 58.) Decided April 7, 1914.

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Case by John Toth against the Osceola Consolidated Mining Company for personal injuries. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Le Gendre & Driscoll, for appellant.

Allen F. Rees (Rees, Robinson & Petermann, of counsel), for appellee.

BROOKE, J. Plaintiff, a man 33 years of age, came to this country from southern Europe in the year 1909. His entire adult life had been spent in the performance of ordinary labor, except for a short time while he was in the army. He was employed by the defendant as a "dirt passer." The duty of a dirt passer in defendant's mine calls him to work in the stope with a pick and shovel. The rock, after it is blasted, must be broken up and shoveled down to a point where it can be loaded into cars. Some of the rock can be shoveled out without being broken, but other pieces are too large to be handled with a shovel, and have to be split or broken with a pick. The custom in force at defendant's mine at the time of the happening of the injury to the plaintiff required the plaintiff to call at the toolhouse at the mouth of the shaft, where he was handed a pick by the shift boss, which he took into the mine with him, using it as occasion required during his shift, and returning it to the toolhouse at the close of the shift. The shovels were left in the drift.

Plaintiff had worked for defendant for six days. Upon the first trial of the case, he swore that on each of these six days he was given a pick which he examined and found to be sharp, but that on the seventh day he was given a pick which he did not examine until after he received the injury complained of, when he found it to be dull. Upon this trial he testified that he could not remember having examined the picks

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given him on the six earlier occasions, but that they were "good" picks. Plaintiff received the injury on account of which he brings suit in the following manner: In the course of his labor he came to a rock so large that it could not be handled with a shovel. He struck the rock at a point where there was a crack in it with his pick. The first blow was a light one, the second he struck with all of his strength, causing the rock to splinter, and a small particle entered one of his eyes. This injury later resulted in the loss of the sight of the injured eye. The negligence relied upon by the plaintiff is the failure of the defendant to give him a sharp or suitable pick with which to perform his labor, and the further failure to warn him of the danger of using a dull pick.

At the close of the testimony, the court directed a verdict for the defendant in the following language:

"The plaintiff claims that he was injured by the use of a dull pick while striking a rock, and causing splinters to fly into his eye. The undisputed evidence is that the plaintiff had this dull pick, and the question resolves itself right down to this question: Is it negligence on the part of the company to fail to warn a man that in striking a rock with a dull instrument, splinters are liable to come off of the rock and strike him and injure him? Now, it doesn't seem to me that is the question before this jury, and I don't see where the jury have anything to pass upon. It seems to me it is clearly a question of law, and, if the court must assume to pass upon the question as a matter of law, assuming what the plaintiff has shown to be true, the situation there is not contradicted. The defendant has not put in any evidence which contradicts the situation here as claimed by the plaintiff: First, that there was a dull pick handed to him. We must assume that as an established fact in this case, that the defendant did furnish a dull pick to do this work. We then would have only the one question left, and that was whether the defendant ought to warn him of the danger of striking rock with a dull pick and pieces might fly. It seems to me the court must pass

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upon that as a question of law, and it is not a matter of fact, a question of fact, rather, for the jury. Now, the more I studied this case, the more it seems to me to come down simply to this: If A. hires B. to go out in the courtyard here to break up a rock, and gives him a hammer or a dull pick and an instrument of that kind, must he warn him when he goes out and strikes that rock, begins to break it, pieces are liable to fly? Now, it seems to me that the matter is one that an ordinary man of ordinary intelligence is bound to know, and it does not seem to me that, if that, you have got to warn the employee against that. If you order the employee to go and drive a nail in that door, you would have to stop and warn him of all danger that might possibly come from striking a nail with a hammer. It seems to me anybody who strikes a rock with a dull pick must know, when he begins to break that rock, there are going to be some pieces fly. It is so simple and so plain. I don't believe a warning is necessary. A man, when he hires out to work at a given employment, assumes all the ordinary risks of that employment. That rule of law claims it. This plaintiff here, when he went and hired himself out to the defendant in this case, he assumed all of the ordinary risks of his employment. It seems to me that this necessarily was an ordinary risk of the employment. I do not see any extraordinary thing about it. If he struck a rock with an instrument, he must have known, when he broke that rock, that pieces would fly. * * * Here is not a case of a defective tool. While it was dull, it had no defect in it, and the fact that it was dull was a matter that the plaintiff was bound and ought to know. When a man is handed a pick—a man of ordinary intelligence—and he was bound to be a man of ordinary intelligence when he sought the work he did, if he looks at a pick, he knows whether it is sharp or dull. He is bound to know. He can't take a pick and afterwards claim he didn't know it was dull. That is a matter so apparent and so obvious that, even if he was a child, the law would require him to know the pick was not a sharp pick; it was dull. We have the plaintiff bound to know he was using a dull pick. As I said at the outset, it was the same as if he was given a sledge hammer to break this rock. That he was bound to

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know when he struck the rock with a dull instrument, when he struck a rock with any instrument, a man knows when he goes to break it there will be a certain amount of splinters fly around. That is all this case is. Therefore I conclude, under the law, I assume the responsibility and direct a verdict for the defendant."

We are of opinion that the direction was warranted. A pick is a tool of common use and of utmost simplicity. As to such tools, reasonably fit in the first instance, the master owes no duty of inspection. *Wachsmuth* v. *Electric Crane Co.*, 118 Mich. 275 (76 N. W. 497); *Meyer* v. *Ladewig*, 130 Wis. 566 (110 N. W. 419, 13 L. R. A. [N. S.] 684).

We think it must be said that it is a matter of common knowledge that, when a rock is struck with great force by any iron tool, whether sharp or dull, splinters are liable to fly as a result of the concussion. A man 33 years of age, who has spent his life in ordinary laborious occupations, could not reasonably be supposed to be ignorant upon this point and require instruction. His ignorance of English or of the customs of the country would not make instructions necessary. The results of such a blow are so common as to be of almost universal knowledge. The blow is struck; the splinters fly. No harm follows, unless, as in the instant case, through some adverse chance a flying particle reaches the eye of the operator. Under such circumstances, the master is under no duty to warn the servant of a danger so common and obvious. *Findlay* v. *Foundry Co.*, 108 Mich. 286 (66 N. W. 50); *Mushinski* v. *Vincent*, 135 Mich. 26 (97 N. W. 43); *Swick* v. *Cement Co.*, 147 Mich. 454 (111 N. W. 110); 4 Thompson on Negligence (2d Ed.), § 4061.

The judgment is affirmed.

MCALVAY, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

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ALPENA ELECTRIC LIGHT CO. *v.* KLINE.

1. ELECTRICITY—PUBLIC SERVICE CORPORATION—POWER AND LIGHT —MICHIGAN RAILROAD COMMISSION.

   Where an electric light and power company was engaged in the production of both light and power, but at different rates to consumers, and one of its patrons, who obtained current for power in an industrial establishment, by the use of transformers furnished by the complainant, employed the current to produce light without paying the higher rate adopted and published by the company for lighting current, an injunction was properly allowed to restrain defendant from so using the current, since his action operated as a discrimination against the other consumers of electricity for lighting purposes.

2. EQUITY—INJUNCTION.

   Before raising the question of reasonableness of rates charged by an electric power and light corporation, in a suit in equity involving an alleged discrimination brought about by defendant's purchasing power and transforming the current into a lighting current, the point should be presented to the Michigan railroad commission which is empowered by Act No. 106, Pub. Acts 1909 (2 How. Stat. [2d Ed.] § 2932 *et seq.*), to pass on the question of rates.

Appeal from Alpena; Emerick, J. Submitted January 23, 1914. (Docket No. 56.) Decided April 7, 1914.

Bill by the Alpena Electric Light Company against Lewis T. Kline for an injunction. From a decree for complainant, defendant appeals. Affirmed.

Henry, Henry & Henry, for complainant.

I. S. Canfield, for defendant.

The complainant in this case is engaged in the manufacture and sale of electric current. It supplies electricity both for light and power. Under Act No.

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106, Public Acts of 1909 (2 How. Stat. [2d Ed.] § 2932 *et seq.*), it is required to and has filed with the Michigan railroad commission its rates for lighting service and its rates for power service. It charges a different and higher rate for the current when used for lighting than when used for power. The defendant owns and operates an industrial establishment in the city of Alpena. Outside the premises of the defendant the complainant, through a transformer, reduces the electricity carried upon its wires from 2,300 volts to 440 volts, and carries the current into the premises of the defendant at the latter voltage. After it is received upon the premises of the defendant, it is there used at said voltage to run certain motors which in turn furnish power for the operation of the plant. A portion of the current is by the defendant again run through a transformer, the voltage reduced to 110, and the current then used for lighting purposes within the plant. Under the system in operation complainant is unable to determine what portion of said current is used for power and what portion for electric light. Application was made to defendant for leave to enter upon his premises and connect his lighting system with the city system of lighting operated by complainant, which was refused. Whereupon complainant filed its bill of complaint praying for a mandatory injunction directing defendant to permit such changes to be made. Complainant is furnishing, and defendant is receiving, the current under a franchise granted by the city of Alpena.

Defendant's answer admits the charge that it is now converting a portion of the current which he receives at a voltage of 440 to a voltage of 110, which he uses for lighting purposes in his industrial establishment. He appears to claim first, that he has a right to do this, inasmuch as it can make no difference to the complainant once the current is upon his premises whether he uses it for the production of power

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or the production of light, and, second, that he converts the current to the lower voltage through machines furnished him for that purpose by the complainant some time before the filing of the bill; and it is his claim that the complainant should now be estopped from demanding that he should discontinue their use. After a full hearing upon the merits, the following decree was entered:

"After reading and considering the bill of complaint, answer, and replication, and after hearing the proofs and allegations of the parties and arguments of counsel, on motion of Henry, Henry & Henry, solicitors for complainant, it is ordered, adjudged, and decreed, and the court now here doth order, adjudge, and decree that the defendant, Lewis T. Kline, be enjoined and restrained from using electricity or electrical power furnished by complainant to him at his industrial works in the city of Alpena for electric lighting in his said works in such a manner or from such a source that the current therefor cannot be metered and measured, and that said Kline be enjoined and restrained from continuing to use said power to generate his lights in his said industrial works from such a source or in such a manner that the current devoted to said lights cannot be accurately determined, metered and measured by complainant; that said complainant recover against the defendant his cost about his suit in this behalf expended, and have execution therefor."

From this decree, defendant appeals.

BROOKE, J. *(after stating the facts).* It is clear that since the passage of Act No. 106, Pub. Acts 1909 (2 How. Stat. [2d Ed.] § 2932), complainant is subject to the control and supervision of the Michigan railroad commission. It is not questioned that, as required by the said commission, it has filed with the commission a schedule of its rates. This schedule is one which divides the users of the current into classes; there being a classification according to the various quantities used, both as to users of the cur-

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rent for power and light. The commission itself has not so far apparently fixed or attempted to fix the rates demanded by complainant. Those rates, however, upon complaint from the proper parties, are, under the terms of the act creating the commission, subject to revision. We understand from the record that no such application has been made. To permit one user to take the current at its power voltage and transform a portion of it to the lighting voltage, and use it for lighting, paying for the whole at the power rate, would be to permit a discrimination against all other users of the power for lighting, because the rate charged for the current when used for lighting is considerably higher than that charged when it is used for power.

It should be noted that the reasonableness of the rates charged for both classes of service according to the schedule filed with the railroad commission is not in issue in this proceeding. The right of a public service corporation to charge a higher rate for the same commodity when used for one purpose than when used for another purpose is perhaps not directly involved, though questioned by defendant. We deem it unnecessary to pass upon the question in this proceeding, as we are of opinion that the contention should in any event first be made before the railroad commission in a proper proceeding. Upon the question reference is had to the following authorities: *Boerth* v. *Gas Co.*, 152 Mich. 654 (116 N. W. 628, 18 L. R. A. [N. S.] 1197); *In re Investigation of Milwaukee Lighting Rates*, 9 Wis. R. R. Com. R. 541; *Silkman* v. *Board of Water Com'rs*, 152 N. Y. 327 (46 N. E. 612, 37 L. R. A. 827). See, also, Principles and Methods of Municipal Trading, by Prof. Douglas Knoop, p. 224.

We are satisfied that the complainant is entitled to the relief prayed, and that, if defendant feels himself aggrieved by reason of excessive charges, his remedy

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is open through a proper application for relief to the railroad commission.

The decree is affirmed.

MCALVAY, C. J., and KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred. MOORE, J., did not sit.

FREMONT CANNING CO. *v.* PERE MARQUETTE RAILROAD CO.

1. PARTIES—ACTIONS—JOINT VENTURES—PARTNERSHIP.
   While it appeared that plaintiff and another firm were jointly interested in the shipping and selling of peaches, and plaintiff attended to the buying and loading, the other firm to selling the peaches for one-half the profits, plaintiff was rightly permitted to recover for the failure of defendant railroad company to provide sufficient cars, pursuant to a preliminary order and arrangement with the plaintiff with whom the contract relations for shipping freight were concluded by defendant, the evidence showing, also, that damages were claimed for peaches which the plaintiff was forced to can and in which the other firm was not jointly interested.

2. CARRIERS—FREIGHT—DELAY IN FURNISHING CARS.
   Where plaintiff claimed that it ordered refrigerator cars from defendant railroad company in which to ship peaches, having, previously to the order, advised defendant that a large number of cars would be needed to move the crop in that vicinity, that defendant neglected to provide refrigerator cars as they were needed and requested, so that plaintiff had to can the peaches and was compelled to use inferior and soft fruit, evidence tending to sup-

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port the claims was properly submitted to the jury as a question of fact, under the terms of Act No. 300, Pub. Acts 1909 (3 How. Stat. [2d Ed.] § 6531).

3. SAME—TRIAL—INSTRUCTIONS.

It was also proper to charge the jury that the dispute was whether the cars were furnished, as requested, and if they were not furnished, whether there was a reasonable excuse; that the goods were perishable, that defendant's duty was not confined to furnishing cars for the village that plaintiff shipped from, that the railroad could not discriminate and must treat all shippers alike, that it was plaintiff's duty to do everything it could to take care of peaches which were left on its hands by reason of defendant's failure to furnish cars, that if it used such peaches in the canning factory and they had deteriorated in value and plaintiff suffered damages accordingly, the verdict should be for that amount, provided the damage resulted from defendant's failure to furnish refrigerator cars, that it was no defense that persons who should have furnished ice for the cars failed or neglected to provide ice, nor was it a sufficient defense that defendant placed more cars at the point of shipment during the season than plaintiff ordered if defendant failed to furnish cars on the dates for which plaintiff ordered them.

4. DAMAGES—MITIGATION—CARRIERS.

Where plaintiff showed that, because of the failure of a common carrier to furnish refrigerator cars for shipping peaches, plaintiff sustained a loss and was obliged to use soft peaches in its canning factory, and that it minimized the damages by saving such fruit as was fit for canning, claiming as a part of its damages the waste resulting from the defective peaches, defendant could not complain of the measure of damages adopted.

5. EVIDENCE—WRITTEN CONTRACT—BILL OF LADING—RAILROADS.

Although bills of lading which were not shown to be genuine were incompetent as evidence of delivery of the freight to the carrier, any error committed in receiving them was cured by the reception in evidence of receipted freight bills covering the same ground and showing the same facts.

6. CARRIERS—NEGLIGENCE.

It was also proper to submit to the jury plaintiff's claim

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that the cars were delayed in transit to the place of consignment, supported by its testimony and contradicted by evidence offered by the defendant.

7. SAME—WEIGHT OF EVIDENCE.

Held, that there was evidence supporting a verdict for plaintiff's entire claim and the judgment should not be reversed as excessive.

Error to Newaygo; Barton, J. Submitted January 23, 1914. (Docket No. 76.) Decided April 7, 1914. Rehearing denied June 4, 1914.

Case by the Fremont Canning Company against the Pere Marquette Railroad Company for damages to freight, delay in shipments and in providing cars, etc. Judgment for plaintiff. Defendant brings error. Affirmed.

Parker, Shields & Brown (Seward L. Merriam, John C. Bills, and *William J. Branstrom,* of counsel), for appellant.

Hall & Gillard, for appellee.

STONE, J. This is an action of assumpsit brought to recover damages upon three separate and distinct causes of action, which are set forth in three separate counts. Counsel upon both sides, in presenting the questions to be considered, have treated the counts separately, and we will attempt to pursue that course in disposing of the case.

In and by the first count of the plaintiff's declaration it alleges that in 1911 it was engaged in carrying on the business of canning fancy fruits and vegetables, and also buying and selling fruits at wholesale and in car lots, and had its principal place of business at the village of Fremont, Newaygo county. The declaration alleges that the country adjacent to the village of Fremont, at the time mentioned was,

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and for some time prior thereto had been, largely devoted to the raising of fruits, and particularly to the raising of large quantities of peaches, and during the season of harvesting the said fruit large quantities of peaches were shipped to various points outside of Fremont by the defendant; that during the summer of 1911 plaintiff contracted with the fruit growers of Fremont and vicinity for the delivery of large quantities of peaches to be delivered to it when they should be harvested, and agreed to pay said farmers a specified price therefor, said peaches to be delivered to the plaintiff at Fremont, some to be canned and packed by the plaintiff in its factory, and some to be shipped by the plaintiff to the wholesale trade at various points in Michigan in car load lots; that as the season advanced it became apparent to plaintiff that, owing to the large crop of peaches, there would be a special need of good transportation facilities to properly dispose of said peaches when they should be harvested and delivered to the plaintiff as aforesaid; that early in the month of August, 1911, it notified the defendant, in writing, of the conditions of the peach crop in Fremont and vicinity by a letter written by Frank Gerber, the manager and treasurer of the plaintiff, to one Frank Frisby, the local agent of the defendant company at Fremont. That letter was as follows:

"August 2, 1911.

"FRANK FRISBY,
"Fremont, Michigan.

"Dear Sir:

"Referring to our conversation relative to the peach crop and the necessity for better service than we have ever had before, beg to say that the more we think of this matter, the more we are impressed that to move this crop and prevent very serious losses, it will be necessary that we have different and better train service than we have had in previous years. We are addressing this letter to you and shall ask the

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other fruit shippers to sign same and would request that you forward the letter with your comments to the proper official of your company.

"The peach crop this year will be far greater than any previous season, and, as we are driving in the country daily, and having this peach crop in mind, we observe large numbers of small orchards which are coming into bearing and which we have never known about before. The aggregate of the crop from these young orchards are of varieties that mature during about the middle of the regular peach season, so that there is going to be a time when the movement will be extremely heavy, although we believe there will be several cars to move every day from this point from the day the season opens until it is finished.

"It seems to us that this business is of sufficient importance to your company to warrant special services with a train starting from Muskegon in time so as to place refrigerators here about 7:00 a. m.. and returning leave White Cloud at 1:00 or 2:00 p. m., and get through here around the middle of the afternoon, or in time so that connections could be made with your trains out of Muskegon.

"Trusting that you will give this matter your immediate attention, and with best wishes, we remain,

"Yours respectfully."

This letter was also signed by E. L. Boyd, Fred Marshall, and others purporting to be fruit shippers. The following reply was received signed by F. Hartenstein, superintendent of the defendant at Grand Rapids, Mich., viz.:

"August 26th, 1911.

"MR. FRANK GERBER, Mgr.,
"Fremont Canning Company,
"Fremont, Michigan.

"*Dear Sir:*

"Your letter to our agent at Fremont relative to the handling of fruit business at that station has been referred to me.

"I do not think that after it is well started there will be any reason for complaint by any of the fruit shippers between White Cloud and Muskegon. I am

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contemplating putting in a train service there that will fulfill the requirements.

"Yours truly,
"F. HARTENSTEIN,
"Superintendent.

"Copy to Mr. W. H. Romoser, Mr. W. J. Quinlan, Mr. F. Frisby."

The declaration further alleges that peaches are a highly perishable commodity, and can be safely shipped only in refrigerator cars, properly iced, and will spoil if not so shipped, and not placed under ice very shortly after they have been harvested; that this is especially true as the peach harvesting season begins during the latter part of August, when the weather is very warm, and peaches require quick handling and good refrigeration in order to keep them from spoiling, all of which facts were known to the defendant; that the plaintiff had been in the canning business for a number of years, and had gained a reputation among the trade for canning and packing only first-class fruit, and especially a first-class brand of peaches; that the defendant, in consideration that the plaintiff should deliver to it by way of its business as common carrier aforesaid the peaches which it should ship in car loads, undertook and promised that it would furnish to the plaintiff at the places designated by it, and at the times designated by it, all of the refrigerator cars needed by it to load the peaches into for certain compensation and reward. It is complained that, notwithstanding the duty of the defendant, it wrongfully, unlawfully, and negligently failed and refused to place at the plaintiff's disposal for loading peaches the number of refrigerator cars ordered by it on the date for which they were ordered, and wrongfully and negligently failed to deliver some of the cars for two or three days after the same were ordered, placed some of the cars for loading in the nighttime, when they should have been placed in the

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morning preceding the night; that, by reason of the wrongful conduct and neglect of the defendant, great quantities of peaches were delivered to the plaintiff which it had no way of shipping; and, before the cars ordered by the plaintiff of the defendant had been placed by the defendant, the peaches had become so soft that they could not be shipped, and were unsalable in their condition, and would have been a total loss but for the acts of the plaintiff hereinafter stated.

Plaintiff avers that when the cars did not arrive it was unable, because of defendant's wrongful acts, to put the peaches in the cars and on ice; that the peaches had begun to deteriorate, and would have been totally spoiled when the cars did arrive; that the plaintiff, therefore, took the peaches that were beginning to deteriorate in value because of defendant's wrongful acts and used them in its factory, canning and packing them, and thereby saving said peaches from being a total loss, and did everything in its power to make defendant's loss, occasioned by its own wrongful act, as light as possible.

The declaration further avers that, had it not been for the wrongful acts of defendant above mentioned, plaintiff would not have been obliged to have canned and packed anything but a first-class quality of peaches, but, owing to the fact of the wilful, wrongful, and negligent acts of the defendant aforesaid, it was obliged to and did can and pack the peaches which had deteriorated, and thereby the enviable reputation of the plaintiff as a canner and packer of a first-class brand of peaches was injured and greatly damaged; that, by endeavoring to make the defendant's loss as light as possible, and using in its factory the peaches which had deteriorated, it became and was necessary to use many more bushels of peaches than it would have taken if it had been able to use a first-class quality of peaches to obtain the same number of cans; that

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plaintiff had to pay its contract price for the peaches, as they were first-class when they were delivered, and would not have canned any but first-class peaches if the defendant had delivered the cars as it should have done, whereby the plaintiff paid out large sums of money for good peaches; and, solely because of the wrongful acts of the defendant as aforesaid, said peaches deteriorated in value, and the plaintiff suffered heavy losses thereby to its damage.

As we understand the plaintiff's position, it is that the damage which it seeks to recover under the first count of its declaration is the loss which it claims it sustained by reason of being obliged to can peaches that had become soft by reason of the neglect and delay of the defendant in furnishing refrigerator cars. The plaintiff offered testimony tending to show the amount of damage sustained by it on account of its having to can the soft peaches in order to prevent such peaches from being a total loss. This testimony was given, in the main, by Mr. Gerber, manager and treasurer of plaintiff, who testified that he had had many years' experience in the business at that place, and the testimony tended to show that the loss occasioned by the failure of the defendant to furnish cars promptly made it necessary to can 3,337½ bushels of peaches, or over 10 per cent. more than it would have taken had the peaches been in good condition for canning. Estimated at a loss of 9¼ per cent. on the amount, brought a total loss under this count, as claimed by the plaintiff, of $1,656.03, which was the amount of damage plaintiff claimed under the first count.

The record in this case is very voluminous, and it will be impracticable to quote any considerable portion of the testimony.

Upon the trial of the case it was the claim of the defendant that there could be no recovery in the case, because it appeared that Loveland & Hinyon Com-

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pany should have been joined as a plaintiff in the case. That claim is based mainly upon what appeared in the examination of the witness Gerber. He testified on direct examination as follows:

"We made arrangement with Loveland & Hinyon Company for the shipping of peaches, a joint account arrangement. This joint account arrangement contemplated that Loveland & Hinyon Company would attend to the selling of the peaches. We would attend to the buying and loading, and then we were to divide whatever profit was made in the operation. This arrangement was made about August 18th. Up to that time the Fremont Canning Company had purchased or made contracts for approximately 15,000 bushels, and very few had been delivered. * * * I cannot say accurately without my records how many peaches were required by the canning company to be used in its factory during the season of 1911. Under our arrangement with Loveland & Hinyon Company the canning company was to take whatever peaches were required for our canning operation from the peaches purchased by the joint account. We were first to take those before any were shipped. As the peaches were brought in each day, they were placed on our platform. We kept the factory in operation, taking such peaches as were required for the operation of the factory, and the remainder were supposed to be put in the refrigerator cars and shipped. The peaches were loaded into refrigerator cars the day they were brought in, if cars were available. After the 2nd of August our field man estimated that 300 cars of peaches would be shipped. I had numerous conferences with Mr. Frisby in regard to that, and we gave him our ideas from time to time as the season progressed as to the extent of the crop. * * * When the cars were placed and loaded, they were billed out. The instructions as to the billing were given by Loveland & Hinyon Company. * * *

"*Q.* Whether or not you could on all of these days have had good peaches to run through the canning factory, peaches in good condition?

"*A.* We could have used the sound peaches as they came in to the exclusion of those that we had on hand.

"*Q.* Why did you use the soft peaches?

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"*A.* Why, to minimize the loss; to keep it down.
"*Q.* Whose loss?
"*A.* The loss of all concerned.
"*Q.* And who is all concerned?
"*A.* Why, both ourselves and Loveland & Hinyon Company, and we felt that the railroad company."

On cross-examination he testified as follows:

"We entered into a joint account arrangement with Loveland & Hinyon Company about August 18th. That may not be the exact date, but it is around that time; at the beginning of the shipping season or a day or so earlier. Under our agreement with Loveland & Hinyon Company we were to buy the peaches through our agents from the growers, and the peaches were to be shipped in the name of Loveland & Hinyon Company to their customers, and the profits and losses divided equally after certain agreed charges were made; the charges were a labor charge, and a charge for the cost of the baskets, and incidental charges. The profits were to be divided equally. We paid for these peaches, and then invoiced on Loveland & Hinyon Company for them, and then they sent us on the money, and the value of the whole account was to be adjusted at the end. In reality they provided the money except for a short interval; that is, I should still further qualify that they provided the money for that portion that we shipped except for a short interval. * * *
"*Q.* Are you interested in the suit of Loveland & Hinyon Co. v. Pere Marquette?
"*A.* Yes, sir.
"*Q.* What is your interest in the outcome of the suit?
"*A.* We are interested in whatever may be recovered on the shipments in which we are interested in that joint account arrangement as I told you.
"*Q.* Shipments of peaches out of Fremont?
"*A.* And Ludington and other points where the joint account may have—where peaches may have been shipped for this joint account. * * *
"*Q.* State whether Loveland & Hinyon were interested in the peaches which you bought in the open market.
"*A.* They were.

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"*Q.* As the season progressed?

"*A.* Yes, sir.

"*Q.* State whether they were interested in the peaches that were bought under contract from these growers.

"*A.* They were.

"*Q.* Then they were interested in all the peaches that you bought during that season?

"*A.* All that we bought at Fremont, and a portion that we bought at Ludington and other points."

On redirect examination he testified:

"*Q.* Calling your attention to your testimony as to paying for these peaches, and then invoicing to Loveland & Hinyon Company, how did you arrive at the price at which the canning peaches were to be paid for?

"*A.* We arrived at the price at which the canning peaches were to be paid for with Loveland & Hinyon by calculating at the time the contract was made the probable cost of the peaches suitable for filling the orders then on our books, and the price was based upon $1 a bushel for the best varieties and the best fruit. We then determined about what prices fruit would be expected to cost us for the different grades that we were to pack or that we might pack in the ordinary course, one year with another, and we fixed the price as 70 cents per bushel for the yellow peaches that we might use in the factory and 50 cents for the white peaches. We paid these prices to the joint account throughout the season, and this is the price we paid for peaches which became soft, and which we ran through the factory; yes, sir. * * * My object in buying peaches on the open market during the season of 1911 was to carry out the spirit of our contract with Mr. Hinyon, and also to reduce the average cost of our fruit, and increase our chance of profit. * * * Some of the peaches shipped by the Fremont Canning Company were billed Fremont Canning Company, some Loveland & Hinyon Company. * * *"

Rebuttal:

"Now, according to the contract with Loveland & Hinyon Company on our joint account arrangement,

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the canning factory was to use whatever peaches it required, and we were to pay for those peaches at the rate of 70 cents a bushel for yellow peaches and 50 cents a bushel for white, which was the average price that we presumed at the beginning of the season that this fruit would cost us under the conditions that we then expected."

Recross-examination on rebuttal:

"*Q.* And those were all bought from what?
"*A.* The joint account.
"*Q.* At what price?
"*A.* 70 cents for yellows and 50 cents for whites.
"*Q.* And what is the average price?
"*A.* Chargeable to the joint account?
"*Q.* No; what is the average price of the peaches which you purchased from the joint account?
"*A.* Oh, 67.55 cents.
"*Q.* Is that the estimate upon which you made your basis of loss in this case?
"*A.* Yes, sir."

As tending to show what parties made the contract, the following testimony of the witness Frank Frisby, local station agent of the defendant at Fremont during August and September, 1911, appears to be pertinent:

"The Fremont Canning Company placed orders for refrigerator cars with me part of the time during those months, but most of the time with my operator. * * * We had written forms at all times; but it is handier for the shipper, I suppose, to use the phone, or tell us at the time when they may happen in the office. I accepted these orders; yes, sir. I didn't refuse an order because they were not written on blanks; no, sir. When orders came in they were placed on file, and between the hours of 5 and 6 were wired to our car distributor at Grand Rapids. * * * I have not the record of the time these refrigerator cars ordered by the Fremont Canning Company were placed; no, sir. * * * I know in a way about the orders given by the Fremont Canning Company for refrigerator cars during the peach season of 1911. There were times when that was not entirely

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filled. * * * I was over to the office and around the plant of the canning company during some of the time."

The following order was received in evidence:

"September 7th, 1911.

"FRANK FRISBY, Agent Pere Marquette R. R.
"Fremont, Mich.

"*Dear Sir:*

"Please enter our order for eight (8) full ice refrigerator cars for delivery tomorrow.

"Yours respectfully,
"FREMONT CANNING COMPANY,
"FRANK GERBER, Manager."

Upon the trial the plaintiff introduced in evidence certain carbon copies of letters written by Mr. Gerber, its manager, to the railroad commission. The witness testified as follows:

"About that time I took the matter up with the railroad commission.

"*Plaintiff's Attorney:* I show you that paper and ask you what it is.

"*A.* A copy of a letter that I wrote to the railroad commission, carbon copy.

"*Q.* Whether or not there was more than one carbon copy made of that?

"*A.* Yes.

"*Q.* And, if so, to whom was it sent?

"*A.* To Mr. Hartenstein, the superintendent of the P. M.

"*Q.* Whereabouts?

"*A.* Grand Rapids.

"*Plaintiff's Attorney:* I offer this in evidence.

"*Defendant's Attorney:* We object to the letter being introduced in evidence, because it is not the first evidence.

"*The Court:* It will be received.

"*Defendant's Attorney:* An exception.

"*The Court:* Let me understand you, your objection is because this is not addressed to the P. M. Railroad Co.?

"*Defendant's Attorney:* That is one objection.

"*The Court:* What is the other?

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"*Defendant's Attorney:* The first objection was that that is not the original, and the original not accounted for. The other objection is that it has absolutely nothing to do with this case; it is immaterial.

"*The Court:* I understand you are called upon to produce a carbon copy which was sent to your company?

"*Defendant's Attorney:* We were called upon to produce a carbon copy, which would be no more admissible than that copy.

"*The Court:* That is a matter of argument. You were called upon to produce the copy, were you not?

"*Defendant's Attorney:* The carbon copy of the original.

"*The Court:* All right, it will be received."

The first letter was as follows:

"August 28, 1911.

"MICHIGAN RAILROAD COMMISSION,
"Lansing, Michigan.

"*Gentlemen:*

"File X—2964.

"Replying to your favor of the 25th, beg to advise that up to this time we have not seen Mr. Hartenstien, nor have we received any communication from him, since writing you on Aug. 24th.

"While we have no official information, it is reported that a special fruit service was to be inaugurated this morning, and we are informed that this train left Muskegon early this morning, but was delayed by an engine failure near Holton, so that up to this hour, 1:40 p. m., this train has not arrived here. We also understand that the local freight train due here at 10:00 a. m. had not left Muskegon at a late hour this forenoon. This, from our point of view, does not look like any improvement in the service; but we appreciate that the troubles this morning may be due to accidents which could not be avoided.

"We are very much in hopes that this matter may work out all right; but the relief must come within the next day or two, or very serious losses will result. We will write you every day advising you regarding the service, until such time as the trains are running satisfactorily, and will send copies of our letters to Mr. Hartenstein. Of course, if conditions are no bet-

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ter tomorrow than they are today, we will communicate with you by telephone or telegraph, and in the meantime we remain,

"Yours respectfully.

"Copy to Mr. Hartenstein, Supt."

Other similar letters bearing date, respectively, August 29, 1911, September 5, 1911, and September 6, 1911, having been offered the following occurred:

"*Defendant's Attorney:* The same objection, may it please your honor. I presume the objection I took before will cover these letters, will it?

"*The Court:* It may cover them, if you wish it to. They will be received.

"*Defendant's Attorney:* The same objection. There is nothing appears here that a copy of these letters has ever been brought to the attention of the railroad company.

"*The Court:* I understand the witness testified that they were.

"*Defendant's Attorney:* He has testified that he sent them there. There is nothing here of record to prove that they have been brought directly to the attention of the railroad company.

"*The Court:* Submitted to the due course of mail, were they?

"*Witness:* Yes, sir.

"*The Court:* Directed to Mr. Hartenstein?

"*Witness:* Yes, sir.

"*Defendant's Attorney:* Save an exception."

Second Count.

Under the second count, as amended upon the trial, the plaintiff sought to recover damages which it claimed it had sustained by reason of the fact that the defendant unreasonably delayed in transit cars which had been delivered to it, containing baskets, and consigned to the plaintiff. The evidence tended to show that there were 12 such cars. The numbers and initials, the point of shipment, the bill of lading and date of shipment, the date of their arrival according to defendant's wheel report, the number of

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days in transit, the distance traveled, and the miles per day that the cars made were put in evidence before the jury.

It was the claim of the plaintiff that most of these cars were unreasonably delayed in transit, by reason of which it sustained a loss by having to buy other baskets and go to a large expense of express charges, etc., and the expense of cartage from other towns, etc., to get other baskets on account of the delay of the cars in transit. In determining the time, and in showing the delay, the court permitted the bills of lading to be introduced in evidence as tending to show the dates when the shipments commenced, and the points of shipment; and the defendant's wheel report, or record, was also put in evidence as to the dates the cars arrived in Fremont.

The reception in evidence of the bills of lading over the objection and exception of defendant's counsel is urged as reversible error. It appeared that most or all of the bills of lading had been received by the plaintiff by mail from the consignors. The objection of the defendant was that the bills of lading were unproved, that their genuineness was not shown, and that they might have been filled out by anybody, and that it was just as necessary to prove their genuineness as it would be to prove the genuineness of an original letter before it was received in evidence, and that the same constituted a contract, if valid. It should be stated that accompanying the bills of lading were freight bills for the charges purporting to be issued at the Fremont station of defendant, and to be an account of the plaintiff with the Pere Marquette Railroad Company, in which the billing station was given, and the waybill number and date, which corresponded with the bills of lading. These freight bills appear to have been receipted by the defendant company, and there is some question whether

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the objection to these freight bills was because of lack of genuineness, or whether that objection was specifically called to the attention of the court, although it appears that defendant's exception was announced as covering all the papers.

The testimony upon the question of damages on account of the failure of the plaintiff to get the baskets within a reasonable time tended to show that the plaintiff had suffered damage in the sum of $338.85, as testified to by the witness Gerber. It included the amount expended for express charges, certain charges for hauling the baskets from Grant, Holton, and other points where it was claimed the plaintiff had to go to obtain the baskets, also storing charges for having to provide for the storage of the baskets finally brought in by defendant, which came too late to be used that season, as well as an item of interest.

Third Count.

The third count was based upon a claim of the plaintiff that the defendant wrongfully failed to place a car load of cans, which arrived on August 22d, at a place where they could be unloaded by the plaintiff; it being claimed that the car was placed upon a siding, at a distant point not accessible to the plaintiff, and that it was not placed upon the plaintiff's siding until 5 o'clock p. m. of August 24th. The evidence tended to show that the agent's attention was called to this, as well as the superintendent's office at Grand Rapids, and that by reason of this delay the fruit which was intended to be placed in the cans was greatly depreciated; the plaintiff claiming a damage of 30 cents a bushel, or $51, as the total amount of damage under this count.

The trial resulted in a verdict and judgment for the plaintiff in the sum of $2,043.88, the exact amount claimed by the plaintiff in its evidence.

There was a motion at the close of the plaintiff's

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case, made by the defendant, for a directed verdict in its favor, and also another like motion at the close of the testimony in the case, both of which were denied, and exceptions taken.

There was a motion by the defendant for a new trial, upon the grounds that the plaintiff wholly failed to make out a cause of action against the defendant, as alleged in its declaration, or any count thereof; because the evidence offered and received upon the trial of the cause wholly failed to support the allegations of plaintiff's declaration, or any count thereof; because the entire evidence offered and received at the trial of said cause did not prove a cause of action against the defendant; because there was no proof in the case to sustain the verdict of the jury; that the verdict was not supported by the evidence offered and received in the trial of the cause; because the verdict of the jury was against the weight of the evidence offered, and was contrary to law, and against the just rights of defendant; because the amount of damages assessed by the jury was excessive, and not sustained by the proof; because the court erred in not granting defendant's motion to direct a verdict; because the evidence wholly failed to show that the defendant was guilty of any negligence which was the direct or proximate cause of defendant's damages; and because the court erred in submitting the case to the jury under the pleadings and proofs in the case.

This motion for a new trial was denied, and the reasons given for denying the same were duly excepted to by the defendant. Defendant has brought the case here upon writ of error, and there are 86 assignments of error in the record. These have, however, been classified, and will be considered under the different heads presented by the appellant.

1. It is the claim that, under the undisputed facts in the case, if there is a cause of action at all, it is

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in favor of the joint account arrangement between the Fremont Canning Company and Loveland & Hinyon Company.

We think that the evidence in the case clearly shows that a contract with the defendant for the furnishing of these refrigerator cars was made with the Fremont Canning Company, the plaintiff. The orders were given by the Fremont Canning Company, and were accepted by the defendant, and there was a contractual relation between the plaintiff and the defendant for the furnishing of the cars. We think the law of this question has been settled by this court in the following cases: *Sisson* v. *Railroad Co.*, 14 Mich. 489 (90 Am. Dec. 252); *McRoberts* v. *Lyon*, 79 Mich. 25-31 (44 N. W. 160); *Wolkins* v. *Knight*, 134 Mich. 347-349 (96 N. W. 445).

It should be borne in mind that the peaches which were canned, and on which it is claimed the damages arose, were not joint account peaches, but belonged to the plaintiff; the plaintiff having the right to take peaches from the mass for canning. But we think the fact controlling that, the contract having been made with the plaintiff, the cars were not ordered by the joint account, but were ordered by the plaintiff. We do not think that there was any error committed by the trial court upon this point.

2. It is next contended by the appellant that, even if the Fremont Canning Company were a proper party plaintiff, there can be no recovery, because cars were furnished within a reasonable time, as appears by the evidence.

By section 8 of Act No. 300 of the Public Acts of 1909 (3 How. Stat. [2d Ed.] § 6531), it is provided as follows:

"Every railroad shall, when within its power so to do, and upon reasonable notice, furnish suitable cars to any and all persons who may apply therefor, for the transportation of any and all kinds of freight

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in car load lots. Every common carrier shall have sufficient cars and motive power to meet all requirements for the transportation of passengers and property which may reasonably be anticipated. In case of insufficiency of cars at any time to meet all requirements, such cars as are available shall be distributed among the several applicants therefor, without discrimination between shippers, or between points of shipment, whether competitive or noncompetitive: *Provided,* preference may be given to shipments of live stock and perishable property."

A thorough examination of the testimony in the case and the authorities cited by counsel satisfy us that a question of fact was here involved, and that the same was properly submitted to the jury by the trial court.

In its charge to the jury the court, after quoting the statute above referred to, said:

"It is not disputed but what the canning company in this case placed their orders with the Pere Marquette Railroad Company from time to time for the cars, that is, for a certain number of cars; there is no material dispute as to the number of cars they ordered upon a given date. The dispute is whether those cars were furnished, and, if they were not furnished, whether there was a reasonable excuse for not so furnishing those cars. * * *"

After again alluding to the statute, the court said:

"This we must concede was perishable property. Now, gentlemen, you must take into consideration the duty of the railroad company under this statute. Their duties are not confined to the village or city of Fremont, nor to the furnishing of cars to the Fremont Canning Company. Their duty is to all shippers of that class, as well as every other class. They cannot discriminate. They cannot give preference. They must treat all alike. Now, in your deliberation of the testimony in this case, you must bear that carefully in mind that the Pere Marquette Railroad Company is a common carrier undertaking under the laws of this State to serve the whole people of this locality,

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the whole people of the locality which is covered by their system, not by one division of that system, but by the whole system; bear that carefully in mind, that they have a duty to perform to all who are in the business of shipping."

Referring to the first count of the declaration, the court charged the jury as follows:

"I charge you that it was the plaintiff's duty when the cars did not arrive on the days for which they were ordered, if you find this to be the fact, to do everything in its power to take care of the peaches which could not be shipped because of the failure to furnish cars, and if you find from the evidence that the plaintiff, in good faith, and for the purpose of taking care of the peaches, and doing all it could to prevent loss, used the peaches in its canning factory, and that said peaches had deteriorated in value because of the failure to furnish refrigerator cars, and if you find from the evidence that the plaintiff did sustain damage in using peaches in their deteriorated condition, then you must determine from the evidence what that damage was, and return a verdict for the plaintiff for that amount.

"I charge you that the measure of the plaintiff's damage in this case, if you find that the plaintiff is entitled to recover, is the loss it sustained by reason of using soft peaches in the factory, instead of using peaches in good condition, if you find that the peaches became soft because of the failure of the defendant to furnish refrigerator cars. Mark that, gentlemen, that is important.

"I charge you that it is no defense to this action that the defendant did not have any refrigerator cars of its own, and obtained its refrigerator cars from the Armour Car Lines. If the defendant accepted orders for refrigerator cars to be placed at Fremont in the season of 1911, it was its duty to furnish them, regardless of the fact that it did not own them itself; and therefore, it is no defense that it could not get these cars from other people when it wanted them, or that it didn't have them itself. * * *

"I charge you that it is no defense if these cars had to be iced by any company or persons; it would be no defense to this company if the persons who were

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to furnish the ice for the cars failed or refused or were unable to furnish the ice. * * *

"I charge you that the fact, if you find it to be a fact, that the defendant placed more cars at Fremont during the entire season than the plaintiff had ordered for the entire season, this fact will not excuse the defendant, if it did not furnish the cars on the dates for which they were ordered, if you find that the defendant had reasonable notice to furnish the cars, and it was within its power so to do."

At defendant's request, the court charged the jury as follows:

"No. 7. I charge you that the defendant cannot be held liable for inability to furnish cars, when furnishing the same would interfere with the general business of the company and the rights of the shippers."

"No. 12. I charge you that the defendant cannot be held liable in this case, if you find that it was unable to furnish cars ordered by the plaintiff, because of a sudden and unusual press of business, or if prevented from so doing by wreck or derailment, or by storm, which destroyed the telegraph service, or by a strike or refusal of the men engaged in icing cars to ice the same in time so that the cars could be transported and delivered by the defendant at the time requested by the plaintiff. I qualify that, gentlemen, No. 12, by saying that that does not go to the original instance, but it is something that must be overcome by them, and you are allowed to consider that proposition showing the delay of such number of cars as might have been interfered with on that account, no more and no less."

"No. 22. I charge you that if you believe from the evidence that the defendant has met and overcome the presumption of negligence established by the plaintiff and has excused its failure to promptly furnish refrigerator cars, your verdict must be for the defendant. That would apply to the first count."

We think that a question of fact was here involved, and it was properly submitted to the jury, whether the cars were furnished within a reasonable time.

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3. The next point urged by appellant is that the plaintiff's damages are too remote and speculative.

We are unable to agree with counsel in this position. The evidence offered by the plaintiff tended to show that, instead of visiting upon the defendant the full amount of damages which might have been claimed by the plaintiff, to wit, the entire loss of the peaches because of the failure of the defendant to furnish refrigerator cars, the plaintiff sought to minimize the damages, and make them as small as might be, and in so doing used the defective peaches for canning purposes. It is the claim of the plaintiff, however, that in so doing a larger quantity of peaches were necessarily used because of their damaged condition, and that the difference in amount, as testified to by the witness Gerber, is claimed for damages in the case. It further appeared that the testimony of the witness Gerber was based upon his prior experience there as manager of the plaintiff company, and is shown by the following excerpt from his testimony:

"*Q.* I want you to explain to the jury how you arrived at the amount of damage you sustained on account of these peaches which you canned were overripe.

"*A.* Our only method of arriving at that was by a comparison with the results of previous years when conditions were about normal, and we have to know about the amount of fruit required for a case which we figure the unit of, each different class of product.

"*Q.* Did you prepare an estimate of the pack of 1910?

"*A.* Yes, sir.

"*Q.* Did you prepare a record of the pack in 1911?

"*A.* Yes, sir."

To this class of testimony the defendant objected, on the ground that it was incompetent, irrelevant, and immaterial, and for the further reason that it was too remote; that what comparisons may have been made in other years had nothing to do with the case.

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The court said:

"I understand that that is confined—you are now speaking of 1910, and all the fruit, do I understand, in 1910, was in normal condition for packing when packed?

"*Plaintiff's Attorney:* That is our theory, your honor.

"*Witness:* *A.* Yes; I figured a normal season.

"*The Court:* And it is the season immediately preceding the one that they claim there was a loss suffered by reason of not being a normal condition. I will receive it."

The further objection was then made that it was too remote and speculative. The objection was overruled, and exception taken. We do not think that the defendant is in a position to complain of the rule or measure of damages adopted in the case.

4. The next objection urged by appellant is that the court erred in the admission and exclusion of testimony, and in the charge. Complaint is specifically made here that the plaintiff offered in evidence, and the court received, over the objection of defendant's counsel, certain letters, above referred to, written to the Michigan railroad commission. It is urged that the letters received were carbon copies of letters written by the plaintiff to the railroad commission. The objection to their introduction was: *First,* that they were not the best evidence because not the originals, and the originals not accounted for; *second,* that they were irrelevant, and had nothing to do with the case, and were immaterial. A carbon of an original may more appropriately be called a duplicate than a copy.

We have looked in vain for any objection that these letters were incompetent, or were self-serving statements, and therefore inadmissible in evidence. Certainly, from an examination of this record, it cannot be said that the attention of the court was challenged

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to this point. Manifestly, the letters were material, and had something to do with the case, and it seems to us that it was the duty of defendant's counsel to have directed the attention of the court to their incompetency, and to the fact that they may have been self-serving statements. They covered matters that were fully testified to by the witness Gerber, and this witness was subjected to a thorough cross-examination. We find no objection or exception sufficient to warrant us in saying that the reception of the letters in evidence was reversible error.

Second Count.

1. The first objection urged is upon the admission of testimony under the second count. It is the claim, under this objection, that the plaintiff was permitted to and did introduce in evidence a number of bills of lading to cover the cars in question, without first showing that they were genuine bills of lading, or contracts made by the defendant.

It is our opinion that these bills of lading when first offered, their genuineness not having been proved, were incompetent as tending to prove the dates on which the cars and baskets were delivered to the defendant for transportation. These bills, however, were accompanied by freight bills, one of which was as follows:

"Freight bill. Date of issue, August 14, 1911. Consignee, Fremont Canning Company. Freight Bill No. 650. Issuing station, Fremont. To Pere Marquette Railroad Co., Dr., for charges on articles transported. Billing station and route, New Richmond. Waybill number and date, 12, 8/11. Car initial and number, C. B. & Q. 104861. Number of packages, articles, and marks. Baskets. Weight, 20,000. Rate, 8½. Freight charges, $17.00. Received payment for the company 8/15, 1911, F. Frisby, Rx Agent. Total, $17. Stamped on it Fremont Canning Company, Paid August 15th, 1911."

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This accompanied the following bill of lading:

"Pere Marquette Railroad Company. Straight Bill of Lading—Original—Not Negotiable. Received subject to the classifications, at New Richmond, Michigan, August 11th, 1911, from E. E. Weed & Company. Consigned to Fremont Canning Company. Destination, Fremont. Car initial, C. B. & Q. No. 104861. Car baskets; weight, subject to correction, 20,000. Class or rate, 8½. E. E. Weed & Company, Shippers. W. E. Johnson, Agent."

Here we have accompanying the bill of lading the freight bill purporting to be receipted in full by the defendant company. We have been unable to find by any specific objection that the genuineness of this receipted freight bill was challenged by defendant's counsel, or that the attention of the court was called to the fact that its genuineness had not been proven. It cannot be said, therefore, that that objection was made. We think that any error which there might have been in ruling that the bills of lading were receivable in evidence was cured by the fact that they were finally accompanied by the receipted freight bills virtually covering the same ground, and containing the same statements. We are of opinion that there was no reversible error in the admission in evidence of the bills of lading and freight bills accompanying them.

2. It is next urged that the cars were moved with reasonable dispatch. This, we think, became a question of fact, and was properly submitted to the jury in the charge of the court. Upon that subject the court charged the jury as follows:

"As to the plaintiff's claim under the second count, I charge you that it is for you to determine from all the evidence in the case whether there was any unreasonable delay in the movement of the cars containing baskets from the various stations from which they were shipped to the plaintiff at Fremont, Mich. And if you find that there was a delay in the movement

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of these cars, or any of them, then you must determine from the evidence in the case whether or not the plaintiff was damaged by such delay; and, if you find that the plaintiff was so damaged, then you must determine the amount of its damage from the evidence in the case.

"I charge you that, if there was an unreasonable delay in the movement of the cars of baskets, then the plaintiff was justified in obtaining baskets from any source from which it could obtain them, using due diligence, its best efforts, and good faith to obtain the same at the least expense possible, and then you will determine from the evidence whether or not it suffered any damage in getting such other baskets, and in keeping said baskets on hand after the season was over, and this amount you will find and return a verdict for the plaintiff. That is qualified, gentlemen, to the expense of recovering other baskets.

"I charge you that the plaintiff is not seeking to recover in this case for any difference between the price that it had to pay for baskets from other parties and the price which Weed & Co. would have furnished baskets to it for. They are not undertaking to recover for that at all. The plaintiff claims that it has been injured and damaged because the defendant unreasonably delayed the movement of the basket cars, and that it had to go to extra expense to get baskets for that reason.

"If you find from all the evidence that the plaintiff is correct in its claim, then you will determine the amount of the damage which it has sustained, and include such amount in your verdict."

3. As we understand counsel, the claim is here made that Loveland & Hinyon Company were interested in this basket transaction, and therefore the plaintiff cannot recover. We have already covered that point in discussing the first count.

Third Count.

We are of opinion that the court did not err in submitting the case under the evidence relating to the third count of the declaration.

An examination of the other assignments of error

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leads us to the conclusion that there is no reversible error in the record. We do not think that it can be said that there was no evidence to support the verdict and judgment, nor that the amount of recovery was excessive. It is true that the recovery was for the identical sum claimed by the plaintiff in the case; but there was evidence to support it. This was a question for the jury. We cannot say that the verdict was against the weight of the evidence.

The judgment of the circuit court is therefore affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, and BIRD, JJ., concurred. MOORE, J., did not sit.

MILLSPAUGH *v.* SCHULTZ.

1. TRIAL—CONDUCT OF ATTORNEY—ERROR.
   Upon the trial of an appeal from justice's court, the statement of plaintiff's attorney that there was a judgment of $200 in the justice's court, which was interrupted by defendant's counsel and which the court told the jury to disregard, was not so prejudicial as to constitute reversible error.

2. PLEADING—JUSTICE OF THE PEACE—DAMAGES.
   In the absence of any demurrer, or objection to the evidence, interposed in justice's court, in an action upon an injunction bond, the declaration, which was based on only one breach, that had been determined by decree in chancery to have taken place, leaving only a question as to the amount of damages, will be *held* sufficient on error.

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Error to Wayne; Mandell, J. Submitted January 27, 1914. (Docket No. 160.) Decided April 7, 1914.

Assumpsit in justice's court by Theodore F. Millspaugh against Frederick E. Schultz and others for the breach of a bond given in an injunction suit. Judgment for plaintiff. Defendants bring error. Affirmed.

Charles Bowles, for appellants.

William C. Stuart, for appellee.

MOORE, J. In November, 1908, the plaintiff purchased, upon contract, a city lot on La Salle street, Detroit. Defendants Schultz and Schultz were the owners of the adjoining lot on the west. The plaintiff began the erection of a house on his lot. He had built the basement, put a subflooring on the first floor, the studding was up and sheeted, the roof was on, a chimney built, and some work had been done on the interior of the house. In January, 1909, the defendants Schultz and Schultz obtained an injunction restraining further building operations. At this time a bond was required and given in the sum of $500 running to the plaintiff, signed by the defendants Schultz and Schultz as principals, and by defendant Willis as surety. Part of the condition is as follows:

"Now, therefore, if the court shall eventually decide that the complainants in said cause were and are not entitled to said writ of injunction, and that the same was wrongfully sued out, in that event, if the said complainants shall pay or cause to be paid to the said Theodore F. Millspaugh such damages as he may have sustained by reason of the wrongful suing out of said writ of injunction, then this obligation is to be void, otherwise to remain in full force."

The chancery case was heard and a decree entered April 22, 1911, dismissing the bill. Said decree contained the following:

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"And it is further ordered, adjudged, and decreed that the said defendant may bring an action at law to recover any damages he sustained by reason of the injunction issued against him in this cause against the principals and surety who executed the bond filed in this cause to save said defendant harmless for any damages he should sustain by reason of the issuing of said injunction in this cause."

It does not appear that any appeal was ever taken from that decree.

On June 3, 1911, this suit was commenced in justice's court. The justice's return shows the following:

"The plaintiff declares in an action of assumpsit on all common counts, specially on a bond, claims damages $500 or under; the defendants plead general issue. The said cause was tried by court. That on the 1st day of November, 1911, I rendered judgment in favor of plaintiff and against defendants for $200 damages and $3.25 costs. And I do further return that the affidavit and bond herewith returned were delivered to me on the 6th day of November, 1911, and the costs of suit and appeal fees were at the same time paid."

The record also shows that a bill of particulars was filed as follows:

Rent on said property for the period of one year, the length of time that plaintiff was delayed by reason of the injunction granted to said Schultz in the completion of the building on the property No. 559 La Salle avenue..	$250 00
Depreciation in materials in the house in being exposed to the weather.....	250 00
Total.....	$500 00

The bond declared upon was the bond given in the injunction suit and from which we have quoted. The following appears in the record:

"*Mr. Sevald:* In justice's court a judgment of $200—

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"*Mr. Bowles:* I take an exception to that remark.

"*The Court:* It is improper, and the jury is instructed to disregard such remark.

"*Mr. Sevald:* I offer in evidence a chancery case, Frederick E. Schultz and Dorothy C. Schultz, Complainants, v. Theodore F. Millspaugh; and I introduce. * * *

"*Mr. Bowles:* I wish to object to any evidence under the plaintiff's declaration; it is insufficient.

"*The Court:* The objecton may be noted. You may proceed, and I will take the matter under advisement."

From a verdict and judgment in favor of the plaintiff the case is brought here by writ of error.

It is claimed the following is reversible error:

"*Mr. Sevald:* In justice's court a judgment of $200."

It will be noted from what we quoted that immediately upon objection the trial judge stated the remark was improper, and the sentence was never completed. In this connection we may say that some testimony was offered bearing upon the damages sustained because of the loss of rents. It is said the admission of this testimony was error. The court told counsel and the jury that the case must go to the jury for recovery only for damage or injury to the material.

Counsel for appellant seem to proceed upon the theory that the jury will not heed what is said by the trial court. We cannot so assume.

It is urged as error that the court declined to exclude all testimony under the declaration and to direct a verdict in favor of defendants. This is based upon the claim that the declaration did not comply with the provisions of section 10378, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 13092), which reads:

"When an action shall be prosecuted in any court of law, upon any bond for the breach of any condi-

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tion other than for the payment of money, or shall be prosecuted for any penal sum for the nonperformance of any covenant or written agreement, the plaintiff, in his declaration, shall assign the specific breaches for which the action is brought."

It is not necessary to decide whether this statute relates to a bond where there is, as in this case, but a single breach.

This case was commenced in justice's court. The language of Justice COOLEY, in *Wilcox* v. *Railroad Co.*, 43 Mich. 584 (5 N. W. 1003), is germane here:

"It is no new thing to have an objection of this sort to the pleadings in justices' courts raised before us. As the proceedings in those courts are commonly managed by parties unlearned in the law, defects in their allegations, when tested by the rules of art, are to be expected in almost every case which is at all complicated. If every such objection were disregarded, pleadings in justices' courts would in effect be dispensed with. Every plaintiff might allege as much or as little as he pleased, and recover without regard to his allegations. If every one were sustained which would be good if made to pleadings in courts of record, the parties in justices' courts would be driven to the employment of legal assistance in every case, and these courts, which are intended for the easy and inexpensive redress of wrongs not of great magnitude, would cease to accomplish their purpose. This court has adopted neither the one course nor the other. It has required the plaintiff in justices' court to apprise the defendant fairly of the cause of action relied upon, but when this has been done, the court has refused to regard formalities or technicalities. The object of the declaration is fully accomplished when the defendant is fairly apprised by it of the grounds of the plaintiff's claim, so that he need be under no misapprehension as to what matters are to be litigated on the trial. *Hurtford* v. *Holmes*, 3 Mich. 460; *Daniels* v. *Clegg*, 28 Mich. 32.

"Does the declaration in this case accomplish this purpose? It certainly informs the defendant what he is sued upon. The contract is recited, and defendant is notified that claim is made against him upon

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it, and upon nothing else. The contract itself specifies the conditions of liability, so that defendant knows there can be no recovery unless performance of these is proved. It is said the declaration does not count upon an assignment. But it counts upon a promise made to another, and upon which there could be no recovery except upon the proof of an assignment. The very claim to recover upon the paper was a claim as assignee, for it was only as assignee that plaintiff could have a right to it. Moreover, the paper was made payable to the railroad company or order, and there was an indorsement upon it by E. D. Kinne, as assignee, which fairly notified the defendant that Mr. Kinne claimed to have become entitled in some manner to order the payment to be made to a transferee. It is true this indorsement might have been more formally made; it might and ought to have assumed the form of an assignment, with such recitals as would have shown Mr. Kinne's authority; but the question now is whether the defendant was thrown off his guard or misled by any defects, and not whether the pleadings might have been made more perfect. We must judge of this upon all the facts, and not upon the face of the papers alone.

"What the defendant ought to do in every case in which the declaration is supposed to be fatally defective, is to demur, and thereby bring the defect at once to the attention of the court, before parties have been put to trouble and expense in preparing for trial. No doubt he has a legal right to abstain from doing this, when the defects, in substance, are such as cannot by any intendment be supplied or overlooked, but this course is not conducive to justice, and courts will not countenance it any farther than they may feel compelled to do so. When the defendant fails to demur, he tacitly concedes the sufficiency of the declaration, and the court will hold him to this concession, whenever this can be done without probable injustice."

See, also, *Carmer* v. *Hubbard*, 123 Mich. 333 (82 N. W. 64).

In the instant case, if the defendants had in the justice's court demurred to the declaration, or objected to the testimony because the requirements of

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the statute had not been observed, the declaration could at once have been amended. This was not done. The bond was before the parties. The decree in the chancery case determined it had been breached. The parties knew that the only question was whether plaintiff had been damaged, and, if so, how much. The defendants pleaded the general issue, and a trial was had upon the merits. We do not find any reversible error.

The judgment is affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

PEOPLE *v.* SEGAL.

1. CRIMINAL LAW—WITNESSES—INDORSEMENT ON INFORMATION.
   Although the prosecuting attorney should indorse on the information names of witnesses who are material, in a prosecution for obtaining money under false pretenses, it was not erroneous to permit the prosecuting officer, who notified the counsel for respondent on the day after he learned their names that he intended to apply for leave to add to the information names of witnesses who, on the trial, gave testimony relative to matters brought out by other witnesses at the preliminary examination.

2. SAME—EVIDENCE—FALSE PRETENSES.
   Evidence that the accused owed $300 upon a previous transaction with the complaining witness, who made a second loan of $500 on representations of respondent that he wanted the money to engage in a deal from which he expected to derive large profits, was not improperly admitted on the trial, as bearing on the matter of intent.

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3. SAME—FRAUD.

Testimony that the respondent claimed to own three car loads of potatoes, which he did not, in fact, have, tended to support the charge that he obtained the loan by false pretenses.

4. SAME—FALSE REPRESENTATIONS.

The false pretenses must refer to some existing fact, and statements concerning what would occur in the future are not a sufficient basis for the charge.

5. SAME.

Evidence *held* to present a question of fact as to the making of false representations and as to respondent's intent to deceive.

Exceptions before sentence from the superior court of Grand Rapids; Stuart, J. Submitted January 29, 1914. (Docket No. 137.) Decided April 7, 1914.

Harry Segal was convicted of obtaining money by false pretenses. Affirmed.

Grant Fellows, Attorney General, *Earl F. Phelps*, Prosecuting Attorney, and *Louis T. Herman*, Assistant Prosecuting Attorney, for the people.

Edward N. Barnard, for respondent.

BROOKE, J. Respondent stands convicted of having obtained the sum of $500 under false pretenses from one Josephine Klepeck. The facts as testified to by witnesses on behalf of the people are as follows: Respondent was acquainted with and lived near Mrs. Klepeck on the same street in Grand Rapids. On March 13, 1909, he went to her and represented to her that he then had three car loads of potatoes which he wished to ship to a rabbi in San Francisco; that he needed $500 to complete the shipment; that he would make $3,000 out of the deal, and would return the $500 to her in three weeks. Two days later respondent moved away from the vicinity, and shortly thereafter moved to New York. Respondent denied

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making any false representations, admitted having received the money and giving a note therefor, and admitted that he had paid nothing upon the note.

The first two assignments of error in the brief for respondent relate to the ruling of the circuit judge permitting the prosecuting attorney to add certain names to the information immediately preceding the opening of the trial. It appears that the prosecuting attorney was sworn and testified that he learned the names of the witnesses in question on the 14th of November, 1911, and notified respondent's attorney the following day that he would apply for leave to add the names to the information. The trial was started on the 17th of November. It appears to be the contention of the respondent that because the prosecuting attorney learned at the time of the examination that certain testimony would have to be supplied by witnesses other than those produced upon the examination, he should have ascertained the names of such necessary witnesses earlier than he did, and that it was error for the court to permit the indorsement of the names in question upon the showing made. The evidence which these witnesses were produced to give tended to show that the respondent had not, at any time near the time when he secured the money from Mrs. Klepeck, shipped three car loads of potatoes, or any other number of car loads of potatoes, out of the city of Grand Rapids. The same evidence was given at the examination, but was given by one whose knowledge was only gained through hearsay. It is apparent that the respondent was not surprised or prejudiced in any way by the order made. The rule as contended for in the brief of respondent's counsel is recognized, but we do not think it was applicable in the instant case.

It appears that in December, 1908, the complaining witness had loaned $300 to respondent and taken a

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note therefor. This transaction occurred some three months prior to the $500 transaction upon which the prosecution of respondent is based. Error is assigned upon the statement made by the prosecuting attorney in his opening statement touching this note, and upon the ruling of the court in permitting it to be introduced in evidence. Respondent admitted that the $300 note, as well as the one for $500, was unpaid. Inasmuch as intent is one of the ingredients of the crime with which respondent stood charged, we are of opinion that the statement in question and the admission of the earlier note was not erroneous. *People* v. *Henssler*, 48 Mich. 49 (11 N. W. 804).

Error is assigned upon the refusal of the court to direct a verdict of not guilty, based upon the contention that the prosecution had not shown a false representation as to an existing fact or past event. Cases are cited on behalf of respondent which demonstrate the entire correctness of his position if the facts make them applicable. It is quite clear that all of the representations made by the respondent were not representations of an existing fact or past event. Some of them were representations as to what would occur in the future, and his promises in relation thereto. There is, however, one statement which clearly refers to an existing fact, and that is that respondent, at the time he applied to Mrs. Klepeck for the loan, was the owner of three car loads of potatoes. Where several false representations are made, one or more of them referring to existing facts or past events, while others refer to future events, it is sufficient to warrant a conviction if the people can show a false representation as to an existing fact, if that false representation was a part of the moving cause which induced the complaining witness to part with her money.

It is urged that to constitute the offense three things must concur: The intent to defraud, a false pretense,

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made with intent to defraud, and the fraud accomplished (*People* v. *Wakely*, 62 Mich. 297 [28 N. W. 871]); and that the people failed to show all three of these elements. This contention seems to rest upon the fact that respondent denied upon the stand that he made the representations as claimed by the complaining witness, and that in securing the money from her he had no intention to defraud. We are of opinion that the relations existing between the parties, the lack of business experience of the complaining witness, together with all the circumstances surrounding the transaction, coupled with the conduct of the respondent immediately after the loan was negotiated, in absenting himself from the city of Grand Rapids, and his failure to return, afforded sufficient ground for the jury to find, in spite of his evidence to the contrary, that the respondent deliberately undertook, by means of false pretenses, to cheat and defraud the complaining witness out of her money.

Error is assigned upon the admission of certain testimony. We have examined these assignments with care, but are of opinion that no error was committed by the trial court in relation thereto.

The conviction is affirmed, and the court below is directed to proceed to judgment.

MCALVAY, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

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HIRDES v. OTTAWA CIRCUIT JUDGE.

1. WITNESSES—PRIVILEGE—HUSBAND AND WIFE—ADULTERY.
Where plaintiff claimed that defendant gave the wife of plaintiff intoxicating liquor and made her incapable of resisting, and had sexual relations with her while she was drunk, the wife was not prohibited from giving testimony by 3 Comp. Laws, § 10213 (5 How. Stat. [2d Ed.] § 12857), which makes the testimony of the wife incompetent in an action brought in consequence of adultery; for the wrong charged by plaintiff is not adultery but assault and rape.

2. SAME—PROCESS—RAPE—MANDAMUS—CAPIAS.
And it was not erroneous to deny defendant's motion to quash the writ of *capias ad respondendum* issued by plaintiff, based principally on the affidavit of plaintiff's wife, so that a writ of mandamus will not issue to vacate such order.

Mandamus by Mike Hirdes against Orien S. Cross, circuit judge of Ottawa county, to compel respondent to vacate an order denying relator's motion to dismiss a writ of capias in an action brought against him by Leonard Vis. Submitted March 28, 1914. (Calendar No. 25,913.) Writ denied April 7, 1914.

Dikkema, Kollen & Ten Cate, for relator.

Smedley, Linsey & Lillie, for respondent.

STONE, J. Relator was arrested by the sheriff of Ottawa county on a writ of *capias ad respondendum*, issued out of the circuit court for said county at the suit of Leonard Vis. Relator was held to bail in the sum of $2,000 on an order made by the respondent, which bail relator gave. Attached to the writ were three affidavits; one of Leonard Vis, the plaintiff, one of Maggie Vis, his wife, and one of Harry Vis, his brother.

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The relator contends that the action was one of criminal conversation of relator with Maggie Vis, the wife of plaintiff. Counsel for respondent contends that the action was for assault and rape committed upon the wife of Leonard Vis, and the furnishing of her with intoxicating liquors; she being a minor. It is the claim of relator that the affidavits of Leonard Vis, the plaintiff, and of his brother, Harry Vis, show that they were made entirely on information and belief. It can properly be said that the statement of the material facts essential to maintain the writ must be found, if they exist, in the affidavit of the wife. Relator made a motion that the court dismiss the writ of capias, for the reason that the affidavits were not such as could be made the basis of a writ of capias to deprive relator of his liberty for the reasons set forth in the motion, which are substantially as follows: (1 and 2) That the affidavits of Leonard Vis and Harry Vis show affirmatively that they were not based upon the personal knowledge of affiants, but upon information and belief. (3) That the affidavit of Maggie Vis, accompanying the other affidavits, and upon which the writ in said cause was issued, was the affidavit of the wife of the plaintiff; that the cause of action set forth in said affidavit of said plaintiff is an action of criminal conversation of the defendant, Mike Hirdes, with the wife of said plaintiff, and that said affiant, Maggie Vis, could not testify to the allegations contained in her said affidavit in the trial of said cause, because of the language of our statute (section 10213, 3 Comp. Laws, 5 How. Stat. [2d Ed.] § 12857), which reads as follows:

"But in any action or proceeding instituted by the husband or wife, in consequence of adultery, the husband and wife shall not be competent to testify."

Respondent denied the motion, and relator prays for mandamus to compel respondent to discharge the writ.

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In the affidavit of Leonard Vis, he swears that the said Mike Hirdes, contriving and wrongfully and unjustly intending to injure him and deprive him of the comfort, fellowship, society, aid, and assistance of his said wife, and alienate and destroy her affection for him, on the 20th day of March, 1913, at the city of Zeeland, wrongfully, wickedly, and unjustly debauched and carnally knew deponent's wife, and did then and there have sexual intercourse with her, as deponent is informed and believes. In another part of the affidavit the plaintiff states that the defendant caused the said wife to become intoxicated in order that he might carry out his wicked purpose of seducing her, as he was informed and believed. The affidavit further states that affiant makes the affidavit for the purpose of procuring a writ of *capias ad respondendum*, and claims that he has a just cause of action against the said Mike Hirdes, and is damaged in the sum of $10,000. The affiant then refers to the accompanying affidavits of his wife and brother.

It is necessary that we should critically examine the affidavit of the wife, Maggie Vis. She therein states that she was 20 years of age, the wife of Leonard Vis, and resided with him in the city of Zeeland; that on the 20th day of March, 1913, in the absence of her husband, Mike Hirdes came to deponent's home and furnished her with a quart of whisky, part of which she drank, and became intoxicated; that the said Hirdes then and there took advantage of deponent's condition, and had sexual intercourse with her; that she did not have will power enough, being in an intoxicated condition, to resist the actions of said Mike Hirdes, which purpose he could not have accomplished had she not been intoxicated. We quote from the affidavit:

"Deponent further says that she gave the said Mike Hirdes no occasion whatever to think or believe that she would be open and subject to his embraces, and

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that in order to have sexual intercourse with her he first procured the liquor, gave it to her, and caused her to be intoxicated. * * * Deponent further says that she refused to have sexual intercourse with him, whereupon he procured this liquor, and, while in the state of intoxication, and not being able to resist, he took advantage of her and had sexual intercourse,"

as above stated, and that the facts stated in said affidavit were within her personal knowledge.

The affidavit of Harry Vis states that on the 20th day of March, 1913, the said Mike Hirdes came to the home of his brother, where deponent and Maggie Vis were, and furnished a quart of whisky, and induced deponent and Maggie Vis to drink a part thereof; that soon after deponent left the house, and Mike Hirdes continued to stay there with the said Maggie Vis.

The respondent denied the motion, for the reason that the charge involved was not one of criminal conversation, but one for assault, and assault with rape, and the unlawful furnishing of liquor to a minor. It appears that at the time the motion was argued the plaintiff in the suit had filed his declaration.

It is our opinion that we have no right, in considering the questions involved, to examine the allegations of the declaration, but the matter must be disposed of upon the condition existing at the time of the arrest of the relator, for, if the affidavits were not sufficient to warrant the arrest upon the writ, they cannot be aided by a subsequent pleading of the plaintiff. The important question is whether the affidavit of Maggie Vis contains such a statement of facts as would permit her, as a witness at the trial of the case, to testify that she was assaulted and ravished by said Mike Hirdes.

In the case of *Stoudt* v. *Shepherd*, 73 Mich. 588 (41 N. W. 696), Justice CAMPBELL said that the words "seduction" and "debauch" are, in civil cases, very

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generally used as substantially similar terms, and that he did not think it important which word was used in the pleadings.

Upon the trial of the case under a proper declaration, would it be competent for the wife, Maggie Vis, to testify that the said Mike Hirdes furnished her with whisky, and caused her to become so intoxicated that she was not in a condition to resist the action of said Hirdes, and that, while in such condition produced by him, he had sexual intercourse with her, she not being able, by reason of such intoxication, to resist his acts and conduct? We are of opinion that it would be competent for her to so testify, and, should those facts be shown to the satisfaction of a jury, that they would be warranted in finding that the conduct of the said Hirdes, under such circumstances, amounted to rape.

In the case of *People* v. *Croswell*, 13 Mich. 427 (87 Am. Dec. 774), Justice COOLEY, after defining the crime of rape, used the following language:

"In the case of *Regina* v. *Camplin*, 1 Den. C. C. 89; same case 1 C. & K. 746, it appeared that the prisoner gave the woman liquor for the purpose of exciting her, but which had the effect to make her quite drunk; and, while she was in a state of insensibility, he took advantage of it and violated her. The court held the act to be rape. The prosecutrix showed by her words and conduct, up to the latest moment at which she had sense or power to express her will, that it was against her will that intercourse should take place. It was no answer to the charge, therefore, that she had no opposing will at the moment when intercourse actually took place, since the prisoner had actually mastered it by means of the stupefying drug, which was the same, as was well remarked by one of the judges, as if it had been overcome by a blow. * * * If the woman was insensible, some degree of physical force must actually have been employed by the prisoner; and no more resistance is required by the law, in any case, than the condition of the woman will permit her to make. * * * The outrage upon the

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woman, and the injury to society, is just as great in these cases as if actual force had been employed; and we have been unable to satisfy ourselves that the act can be said to be any less against the will of the woman when her consent is obtained by fraud than when it is extorted by threats or force."

In 33 Cyc., at pages 1426 and 1427, it is said:

"So, if ability to resist is taken away by administering drugs, even though the woman may be conscious, sexual intercourse with her is rape. * * * And if the woman is intoxicated to the extent of being unable to resist, the act is without her consent and is rape"—citing many cases.

Especially should this be the rule if the state of intoxication is produced by the defendant. To the same effect see *Commonwealth* v. *Burke,* 105 Mass. 376 (7 Am. Rep. 531); *State* v. *Atherton,* 50 Iowa, 189 (32 Am. Rep. 134). See note to *State* v. *Warren,* 232 Mo. 185 (134 S. W. 522), reported in Ann. Cas. 1912B, 1043-1049.

In such a case we think that the statute of this State above referred to would not prohibit the wife from testifying, because the charge would not be that of adultery, but of an assault and ravishment. *People* v. *Upton,* 169 Mich. 31 (135 N. W. 108); *Totten* v. *Totten,* 172 Mich. 565 (138 N. W. 257).

In the case of *Egbert* v. *Greenwalt,* 44 Mich. 245 (6 N. W. 654, 38 Am. Rep. 260), the cause of action was for the alleged criminal conversation with the plaintiff's wife. The suit was in the common form of an action on the case. The whole testimony to prove the imputed intercourse and establish the cause of action was given by Greenwalt and his wife. The act was represented as one to which she was an involuntary party, and as having been accomplished against her will by actual force and over the stoutest resistance of which she was capable. The record contains a general exception to the court's refusal to con-

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sider the evidence sufficient to bar the action. Justice GRAVES said:

"The point of the objection is understood as being that the nature of the action excluded the idea of violence, and contemplated that the wife's participation was voluntary and not forced, and that, as the case made by the evidence negatived her consent and proved that she was debauched by violence, the action failed.

"The position is not tenable. The common law, in giving this remedy, instead of making the husband's right of action depend on his wife's having consented to her defilement, has invariably, whatever the truth might be, decisively assumed that she did not assent, but was overcome by force, and the action has been sustained just the same, whether, as matter of fact, her will concurred, or she was outraged by actual violence [citing cases]. And there seems to be no basis in justice or policy for the position that if the personal wrong is accompanied by circumstances of such atrocity as to elevate it to the public offense of rape the private remedy is thereby either taken away or suspended. Cooley on Torts, 86 to 90. It is not reasonable to convert the wife's innocence into a shield to save her assailant from prosecution for his private wrong to her husband."

In *Johnston* v. *Disbrow*, 47 Mich. 59 (10 N. W. 79), Disbrow charged the defendant below, Johnston, with having, at a certain time and place named, unlawfully, forcibly, and violently assaulted the wife of said plaintiff, compelling her by force to have unlawful sexual carnal intercourse with him (the defendant) to the injury, etc., whereby plaintiff was damaged in his reputation, and suffered in injured feelings and of being deprived of the society and assistance of his said wife, to his damage. We refer to this case because it is the claim of relator's counsel that, if force was used by Hirdes, and he was guilty of rape, the wife should have brought the action, and not the husband. In the last-cited case, Chief Justice MARSTON, in speaking for the court, said:

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"While it may be true as argued that the reputation of the plaintiff should not suffer because of such a wrong committed by force and against the will of his wife, yet that the matter would become a subject of unpleasant comment and injure his feelings cannot well be questioned, and the right to recover damages therefor is well settled in this State (*Scripps* v. *Reilly*, 38 Mich. 23), and no evidence as to the amount thereof in dollars and cents need be proven on the trial. The jury, in view of all the facts, are qualified to fix the amount thereof. The fact that the wife of the plaintiff also has a cause of action for the same injury and would be entitled to recover damages on account of injured feelings, is no answer to the right of this plaintiff to recover. His right to maintain the action grows out of his marital relations with the person upon whom the wrong was committed. And this right is not possessed by others, so that the fears expressed that all the relatives and neighbors of Mrs. Disbrow might maintain separate actions and recover damages on account of injured feelings is not to be seriously feared."

See Cooley on Torts, p. 226; *Berger* v. *Jacobs*, 21 Mich. 215-220. At the last-named page this court said:

"But, on the other hand, for any damages accruing to the husband from the assault and battery upon the wife, as for loss of her assistance and society, * * * he alone could sue."

See *Velthouse* v. *Alderink*, 153 Mich. 217 (117 N. W. 76, 18 L. R. A. [N. S.] 587, 15 Am. & Eng. Ann. Cas. 1111).

The provision (section 10213, 3 Comp. Laws, 5 How. Stat. [2d Ed.] § 12857), above referred to has been in our statute at least since 1861, and existed at the time the above decisions were rendered.

We think that, in support of the state of facts set forth in the affidavit of Mrs. Vis, she would be a competent witness upon the trial of the case, and that it cannot be said that the affidavits for the writ of capias were defective or insufficient.

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In our opinion, the circuit judge did not err in so holding, and the writ of mandamus must therefore be denied, with costs against relator.

MCALVAY, C. J., and BROOKE, KUHN, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

ATTORNEY GENERAL, *ex rel.* DINGEMAN, *v.* LACY.

1. CONSTITUTIONAL LAW—LOCAL LEGISLATION — COURTS—VALIDITY OF STATUTE.

   The provisions of article 5, section 30, of the Constitution, which provides that no local act shall be passed by the legislature if a general act can be made applicable, and that local acts shall be approved by the electors of the district to be affected before they may become law, were intended to abolish the abuses prevalent in the legislature in the enactment of special legislation and to secure to the people of the State the right to control their local affairs within the community affected.

2. SAME—COURTS—GENERAL LAWS.

   The section of article 7 vesting the judicial power in the Supreme Court, circuit courts, etc., requires the establishment of inferior courts under general laws enacted by the legislature; local legislation being prohibited by necessary implication.

3. SAME—CLASSIFICATION—POPULATION.

   Since the Constitution was intended to prohibit local or special acts except under the conditions specified therein, its provisions cannot be evaded by classifying counties or divisions according to population for the purpose of establishing inferior courts.

4. SAME—DOMESTIC RELATIONS, COURT OF—LOCAL ACTS.

   Act No. 186, Pub. Acts 1913, creating a court of domestic relations in counties having upwards of 250,000 popula-

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tion, is local in its purpose and effect and violates the above-mentioned sections of the Constitution.

5. SAME—CLASSES.

In order to warrant the legislature in so classifying municipalities or other subdivisions of the State, it is necessary to find justification therefor in some substantial difference in conditions arising out of the greater number of inhabitants, and in no case may such a classification be sustained where it is a manifest subterfuge.

6. SAME—JUVENILE COURTS—PROBATE COURTS.

In depriving the probate court of jurisdiction in cases of juvenile delinquency, the statute (section 10) further violates the Constitution, article 7, sec. 13.

7. SAME—COURTS—JURISDICTION OF CIRCUIT COURTS.

And it is also invalid because the act attempts to deprive the circuit court of Wayne county of a portion of its appellate jurisdiction conferred by section 13, art. 7, Constitution.

8. SAME—COURTS—DE FACTO JUDGE—DOMESTIC RELATIONS.

Acts of the judge of the court of domestic relations created in Wayne county pursuant to the invalid legislation are not open to jurisdictional objections, being the acts of a *de facto* officer.

Information in the nature of *quo warranto* by Grant Fellows, attorney general, on the relation of Harry J. Dingeman, against Arthur J. Lacy, judge of the court of domestic relations for the county of Wayne, to try respondent's title to said office. Respondent demurred to the information. Demurrer overruled and judgment of ouster entered. Submitted January 30, 1914. (Calendar No. 25,902.) Decided April 17, 1914.

Grant Fellows, Attorney General *(Fred A. Baker, Robert T. Speed,* and *Elbridge F. Bacon,* of counsel), for relator.

Otto Kirchner and *Jasper C. Gates (Alfred Lucking,* of counsel), for respondent.

William L. Carpenter, for board of supervisors of Wayne county.

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This is a proceeding in *quo warranto* to test the title of respondent to the office of judge of the court of domestic relations in the city of Detroit. Respondent's right to the office is questioned solely upon the ground that the statute creating the court in which he sits as judge is unconstitutional. The title and the first eleven sections of the act (Act No. 186, Pub. Acts 1913) follow:

"An act to provide and establish a court of domestic relations in each county of this State, which has a population of upwards of two hundred fifty thousand, to define its jurisdiction and for the purpose of this act to provide for additional circuit judges in such counties.

"*The people of the State of Michigan enact:*

"SECTION 1. There shall be in each county of this State, which has a population of upwards of two hundred fifty thousand, a court of domestic relations, which shall be a court of record, having one judge whose term of office shall commence on the first day of September, nineteen hundred thirteen. The office of the judge of the court of domestic relations hereby created, shall be deemed vacant from and after the taking effect of this act, and shall be filled by appointment by the governor of the said State, and such judge shall hold office until the next general election.

"SEC. 2. At the first general election held in said counties, respectively, after this act shall take effect, the qualified electors of each such county shall, in the manner prescribed by law for the election of circuit judges, elect a judge of the court of domestic relations of such county, and his term of office shall continue until the first day of January, nineteen hundred eighteen. Thereafter all judges shall be elected every six years at the April election next preceding the expiration of the term of the then incumbent. In case of a vacancy in the office of judge of the court of domestic relations, the governor shall fill said vacancy, and the incumbent so appointed shall hold office until the next general election. The provisions of law relative to nomination and election of circuit judges shall in all cases govern the nomination and election of judges of the court of domestic relations.

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"SEC. 3. Said judge, by virtue of his office, shall be a circuit judge of the circuit court of the same county, and as such it shall be his duty to hear and determine all suits for divorce, all suits for annulment of marriage, and all other such suits, actions and proceedings shall be for that purpose assigned to him by the presiding judge of said circuit court. The court of domestic relations shall have original jurisdiction to hear, try and determine all criminal cases wherein the crime, misdemeanor, offense or felony charged shall have been committed within the county in which said court of domestic relations is located, which crime, misdemeanor, offense or felony shall be because of violation of the laws: *First,* compelling the support of wife and minor children by the husband and father; *second,* forbidding the desertion and abandonment of wife or minor children by the husband and father; *third,* prohibiting contributing to the delinquency of children; *fourth,* compelling the compulsory education of children; and *fifth,* forbidding cruelty to children. Said court shall have original jurisdiction to hear, try and determine all actions brought to compel the support of illegitimate and bastard children under the laws of the State of Michigan.

"In furtherance of the foregoing purposes, said courts of domestic relations shall also have original jurisdiction of all prosecution and proceedings in behalf of the people of the State for all crimes, misdemeanors and offenses arising under the laws of this State, and committed within the limits of their respective counties, except in cases which, under the constitution of this State, may be exclusively cognizable by the police courts and justice of the peace of such counties, under and by virtue of the following statutes of this State, to wit:

"Act number two hundred sixty-four of the public acts of eighteen hundred eighty-nine, entitled 'An act relative to disorderly persons,' etc., being section nine hundred twenty-three of the Michigan Compiled Laws of eighteen hundred ninety-seven, so far as the same relates to the abandonment or threat to abandon wives or children, and refusal or neglect to support them;

"Act number one hundred fifty-six of the Public Acts of eighteen hundred ninety-three, entitled 'An

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act to provide a penalty for cruelty to children,' being section eleven thousand five hundred seven of the Compiled Laws of eighteen hundred ninety-seven, as amended by act number two hundred thirteen of the Michigan Public Acts of eighteen hundred ninety-seven;

"Act number one hundred forty-four of the Michigan Public Acts of nineteen hundred seven, entitled 'An act to prevent a desertion and abandonment of wife or children by persons charged by law with the maintenance thereof; to make such abandonment and desertion a felony and to prescribe punishment therefor; to provide for the care of the dependent wife and children, and to repeal act number thirty-nine of the Public Acts of nineteen hundred three;'

"Act number two hundred eighty-four of the Michigan Public Acts of nineteen hundred seven, entitled 'An act to provide punishment for wife desertion in certain cases;'

"Act number three hundred fourteen of the Michigan Public Acts of nineteen hundred seven, entitled 'An act to provide for the punishment of the persons responsible for or contributing to the delinquency of children;'

"Act number two hundred of the Public Acts of nineteen hundred five, entitled 'An act to provide for the compulsory education of children, for penalty for failure to comply with the provisions of this act, and to repeal all acts or parts of acts conflicting with the provisions of the same, as amended by act number seventy-four of the Public Acts of nineteen hundred seven, and act number two hundred fifty-five of the Public Acts of nineteen hundred eleven.'

"And under and by virtue of any and all other statutes amendatory of, or supplementary to any of the statutes above specified, and any and all other statutes relating to crimes, misdemeanors and offenses above specified.

"SEC. 4. In all cases determined by any police court or justice of the peace within the limits of their respective counties, under either or any of the statutes hereinbefore specified, an appeal may be taken to the court of domestic relations of the same county, in the same manner and with the same effect as prescribed by the general laws of the State for appeals from

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convictions by justices of the peace within this State to the circuit court in criminal cases; and said courts of domestic relations are hereby given exclusive jurisdiction of all appeals from convictions under said statutes.

"SEC. 5. Said court of domestic relations shall have power to issue all lawful writs and process, and to do all acts which may be necessary and proper to carry into complete effect the powers and jurisdiction given by this act. And further, in all prosecution and proceedings for the punishment of misdemeanors, under and by virtue of the statutes above mentioned, to issue all writs and process, and to do all acts which justices of the peace within their respective jurisdictions may issue and do by the laws of this State, and shall therein as far as applicable be governed by the provisions of law regulating criminal cases and proceedings before justices of the peace.

"SEC. 6. In the hearing and trial of all cases pending in the circuit courts of the same county, the trial of all felonies and the trial and hearing of all causes and proceedings in the exercise of its appellate jurisdiction, the practice and proceedings of said court of domestic relations shall be the same as those prescribed by law for circuit courts in this State, in like cases, unless otherwise limited by this act; and the rules prescribed by the Supreme Court for the guidance and practice of circuit courts shall be the rules of said court of domestic relations in its proceedings above specified in this section so far as the same may be applicable; but it shall have the same power and make rules for its practice and proceedings as is by law given to circuit courts, or the judges thereof.

"SEC. 7. Whenever a husband shall, without good and sufficient cause, desert his wife, or shall have deserted his wife, or being of sufficient ability to support her, shall refuse or neglect to properly provide for and suitably maintain her, being a resident of this State, the court of domestic relations of any county in this State in which said husband or wife shall reside, shall, on the application of the wife by petition, allot, assign, set apart and decree to her as alimony, the use of such part of her husband's real and personal estate, or such proportions of his earnings, income or revenue, as the court may determine, in its discretion,

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and during the pendency of the proceeding may require the husband to pay such sums to carry on the proceeding, or for her support as it shall deem necessary, in like manner as provided by section eight thousand six hundred twenty-eight of the Compiled Laws of eighteen hundred ninety-seven, in case of suits for divorce.

"SEC. 8. In every proceeding pursuant to the preceding section the proceedings and practice therein shall be the same, as near as may be, as is now provided for by law in cases of a petition or bill for divorce and alimony, and said court of domestic relations shall have and exercise the same power and authority therein.

"SEC. 9. In all proceedings brought pursuant to the two last preceding sections, the court may order and decree concerning the care, custody and maintenance of the minor children of the parties, and may determine with which of the parties the children, or any of them, shall remain, and during the pendency of the proceeding, may assign and decree to the wife the possession of any of the real and personal estate of the husband, and the court may decree the payment of a fixed sum of money for the support of such wife, and minor children, and that the payment of the same be secured upon real estate, or otherwise, at such times and in such manner as may be proper. and may enforce the performance of such decree by the sale of the real estate of the husband, or otherwise, as may be necessary. And the court shall have power to change the allowance from time to time, according to the circumstances, and may revoke such allowance altogether on satisfactory proof of a voluntary and permanent reconciliation: *Provided, however,* that such allowance shall be only during the joint lives of such husband and wife.

"SEC. 10. In relation to any and all children of parents who shall or may be brought before said court, under and by virtue of the provisions of sections seven, eight and nine of this act, and of parents who shall be parties to any suit for divorce, or for the annulment of marriage, said court of domestic relations shall have and exercise all the jurisdiction, power and authority of juvenile courts, under and by virtue of

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act number three hundred twenty-five of the Public Acts of nineteen hundred seven, during the pendency of such proceedings.

"SEC. 11. The judge may appoint one or more persons to act as probation officers and such other clerical assistance as may be necessary, to be paid from such funds as may be appropriated for the purpose from time to time by the county board of supervisors. The judge of said court may appoint other probation officers who shall receive no compensation from the public treasury for the duties performed under such appointment. A probation officer shall hold office during the pleasure of the court and shall act upon all cases in obedience to the orders of the court: *Provided*, that the court shall notify the State board of corrections and charities of the appointment of all probation officers who shall make such reports to said board as said board may from time to time demand."

Certain constitutional provisions are involved:

"ARTICLE VII.

"SECTION 1. The judicial power shall be vested in one Supreme Court, circuit courts, probate courts, justices of the peace and such other courts of civil and criminal jurisdiction, inferior to the Supreme Court, as the legislature may establish by general law, by a two-thirds vote of the members elected to each house."

"SEC. 8. The State shall be divided into judicial circuits in each of which there shall be elected one circuit judge. The legislature may provide by law for the election of more than one circuit judge in any judicial circuit. A circuit court shall be held at least four times in each year in every county organized for judicial purposes. Each circuit judge shall hold court in the county or counties within the circuit in which he is elected, and in other circuits as may be provided by law."

"SEC. 13. In each county organized for judicial purposes, there shall be a probate court. The jurisdiction, powers and duties of such courts and of the judges thereof shall be prescribed by law, and they shall also have original jurisdiction in all cases of juvenile delinquents and dependents."

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"ARTICLE VIII.

"SEC. 17. The legislature may by general law confer upon organized townships such powers of a local, legislative and administrative character, not inconsistent with the provisions of this Constitution, as it may deem proper."

"SEC. 20. The legislature shall provide by a general law for the incorporation of cities, and by a general law for the incorporation of villages; such general laws shall limit their rate of taxation for municipal purposes, and restrict their powers of borrowing money and contracting debts.

"SEC. 21. Under such general laws, the electors of each city and village shall have power and authority to frame, adopt and amend its charter, and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the Constitution and general laws of this State."

"ARTICLE V.

"SEC. 21. No law shall embrace more than one object, which shall be expressed in its title," etc.

"SEC. 30. The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question. No local or special act shall take effect until approved by a majority of the electors voting thereon in the district to be affected."

BROOKE, J. *(after stating the fact).* Considering the history of legislation under the Constitution of 1850, it is apparent that there had grown up a pernicious practice on the part of the legislature in passing local acts. The practice was bad in two very important particulars. In the first place, much of the legislation thus enacted constituted a direct and unwarranted interference in purely local affairs and an invasion of the principles of local self-government. In the second place, such legislation affecting as it did certain limited localities in the State, the senators and

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representatives from unaffected districts were usually complaisant, and agreed to its enactment without the exercise of that intelligence and judgment which all legislation is entitled to receive from all the members of the legislature. This course led to many abuses (principally in amendments to city charters), some of which found their way into the courts, and were there redressed so far as the Constitution then in force would permit.

With these evils in mind, the Constitution of 1909 was formulated and adopted by the people. From a reading of the provisions above quoted and others of a similar character, it is, we think, entirely clear that it was the settled purpose of the framers of the new instrument and of the people who adopted it to forever insure to the people the right to control their affairs purely local, and to secure for all general legislation grave attention and the application of the collective wisdom of the legislators.

Assuming that we are correct in this premise, it is pertinent to inquire whether the object has been achieved. Based upon a classification by population, we find that the legislature of 1909 passed two acts purely local in application. In 1911 five such acts were passed, and in 1913 there were thirteen. Some of these may be justified under the new Constitution; but, regarding them as a whole, it is evident that, if classification by population is broadly sustained, local legislation may now be as freely enacted as before the adoption of the new Constitution, thus evading and avoiding the salutary check which that instrument sought to impose.

We take it to be conceded by counsel for respondent that the court of domestic relations is a new or "other" court within the meaning of article 7, § 1, of the Constitution, and that to be valid it must be established by "general law."

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We note, but disagree with the contention of one of respondent's counsel (Mr. Gates), that there is nothing in section 1, art. 7, which, either expressly or by implication, prohibits the legislature from establishing "other courts of civil and criminal jurisdiction inferior to the Supreme Court by a *local law.*" The section in question authorizes the establishment of such courts by *general law.* If the contention is sound, the use of the word "general" was wholly superfluous. The language is unambiguous, and by necessary implication prevents the establishment of such courts by *local laws.*

It is, however, contended that the act in question is valid as a general law. The act is limited in its operation by its title to "each county of this State which has a population of upwards of two hundred fifty thousand." It is conceded that Wayne county is the only county having the requisite population. It is said that, if the normal increase in Kent county continues, that county will come under the operation of the act between 20 and 30 years hence. It is certain that the law can never become operative in a vast majority of the counties of the State. Personally, I am of the opinion that under the new Constitution all general legislation based upon classification of population, except such as is therein specifically authorized, is forbidden. Some of my associates, however, do not agree with me in this view. For the purposes of this case, therefore, I will assume that some general legislation based upon such classification may be valid. Under this assumption, is the act in question a valid general law?

Dillon, in his work on Municipal Corporations, vol. 1, § 151, says:

"But classification by population cannot be made arbitrarily and without reason. There must be some reason, in the nature of things, for the distinctions adopted. The size of the municipality as evidenced

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by its population must have a reasonable relation to the subject-matter of the legislation, and must furnish some fairly apparent reason for legislation differing from that applicable to other municipalities having a substantial difference in population."

The cases where such classification has been sustained are collected in note 5 to the section. There are many cases where classification by population has been held invalid, among them the following: *People* v. *Election Commissioners,* 221 Ill. 9 (77 N. E. 321, 5 Am. & Eng. Ann. Cas. 562); *State* v. *City of Des Moines,* 96 Iowa, 521 (65 N. W. 818, 31 L. R. A. 186, 59 Am. St. Rep. 381); *State* v. *Downs,* 60 Kan. 788 (57 Pac. 962); *St. Louis* v. *Dorr,* 145 Mo. 466 (41 S. W. 1094, 46 S. W. 976, 42 L. R. A. 686, 68 Am. St. Rep. 575); *Wanser* v. *Hoos,* 60 N. J. Law, 482 (38 Atl. 449, 64 Am. St. Rep. 600); *Rauer* v. *Williams,* 118 Cal. 401 (50 Pac. 691).

In the *Henneberger Case,* 155 N. Y. 420 (50 N. E. 61, 42 L. R. A. 132), the court said:

"Although this act is drawn in general terms, if its provisions are such in number and character as unduly, with reference to the constitutional purpose, to restrict its operation, and, to all intents, to confine it to a particular locality, then, I think it comes as much under condemnation as though it designated the locality by name. While an act might be general, if it affected all towns of a class and that class was based on population, or some other condition, which might be recognized as possibly common to a class, or which might permit of classification, if it contain such added limitations as to restrict its operation to what must always be, in the nature of the case, a very limited number of specified localities, if not, in fact, one, then it is local within the constitutional sense."

Later, in the case of *People* v. *Dunn,* 157 N. Y. 528 (52 N. E. 572, 43 L. R. A. 247), the same court sustained the statute authorizing a special jury in certain cases in each county of the State having a population of 500,000 or more. After distinguishing the

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case from the *Henneberger Case, supra,* the court said:

"There is nothing in this act to limit its general application in all cases where the population of the county has attained a certain size, and such a condition might reasonably be considered as possible generally."

A consideration of all the cases cited, as well as many others, convinces us that a classification by population can never be sustained where it is, as in the case at bar, a manifest subterfuge. The act under consideration might with equal propriety have been limited in its operation by its title to the county of Wayne. Its "general" character is not established by the use of other words which mean the same thing. The classification attempted cannot find excuse in necessity. Under the Constitution, additional circuit judges may be created as necessity requires. If changing social conditions require a broadening of their powers, that may be readily supplied through suitable legislation.

The domestic relations of the inhabitants of the counties of Wayne, Jackson, or Ogemaw are essentially the same. The same problems touching these relations are presented in every community, though with a frequency varying with the population. There is no reason, founded in logic, why the residents of Wayne county should be subjected to regulations in their domestic relations which are not applicable to residents in all other parts of the State.

The act is clearly unconstitutional, because it in terms (section 10) deprives the probate court of jurisdiction in certain cases of juvenile delinquents and dependents, which jurisdiction is expressly conferred upon the probate courts by section 13, art. 7, of the Constitution.

The act (section 4) is plainly in conflict with the

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last-named section, in that it deprives the circuit court of the county of Wayne, or at least the other judges thereof, of appellate jurisdiction in certain enumerated cases. This the legislature may not do. *People, ex rel. Allen,* v. *Kent Circuit Judge,* 37 Mich. 474; *People, ex rel. Heath,* v. *Kent Circuit Judge,* 37 Mich. 372. Circuit courts are constitutional courts, and the jurisdiction conferred by the Constitution cannot be diminished by legislative enactment. *Nichols* v. *Judge of Superior Court,* 130 Mich. 187 (89 N. W. 691), and cases cited.

The court of domestic relations is created by legislative enactment. A judge of that court cannot lawfully be clothed with a jurisdiction conferred by the Constitution upon a constitutional officer. *State* v. *Hastings,* 10 Wis. 525; *Ex parte Corliss,* 16 N. D. 470 (114 N. W. 962). See, also, *People, ex rel. Allen,* v. *Kent Circuit Judge, supra; Allor* v. *Wayne County Auditors,* 43 Mich. 76 (4 N. W. 492).

Inasmuch as respondent, under the authority of a legislative enactment, assumed to exercise a portion of the jurisdiction of the circuit court, which is a constitutional court, we are of opinion that such of his judicial acts as are within the jurisdiction of the circuit court should be considered as those of a *de facto* judge, not open to question upon jurisdictional grounds.

For the reasons assigned, we feel constrained to overrule respondent's demurrer, and direct a judgment of ouster.

McALVAY, C. J., and KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred. OSTRANDER, J., concurred in the result.

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PECK v. DETROIT UNITED RAILWAY.

1. CONSTITUTIONAL LAW—FRANCHISE—LIMITATION.
   A franchise granted to a street railway corporation by the city of Detroit, reserving to the city the power of revocation at will, and providing for no definite term, is not void under section 29, art. 8, of the Constitution, whereby franchises for a longer period than 30 years are prohibited, since the grant cannot extend beyond the period limited by the Constitution.

2. SAME—MUNICIPAL OWNERSHIP—FRANCHISES.
   Where the common council of the city of Detroit passed a franchise with a proviso that if the city should engage in the operation of street railways it should purchase the tracks and equipment of the portion covered by such franchise at a price to be determined by agreement or by arbitration, the proviso did not violate the Constitution by limiting the power of the council to revoke the resolution, and could not be construed as having that effect.

Appeal from Wayne; Mandell, J. Submitted January 19, 1914. (Docket No. 115.) Decided May 4, 1914.

Bill by Barton L. Peck and another against the Detroit United Railway and city of Detroit for an injunction to restrain the construction of a line of street railway proposed to be built under a municipal franchise. From an order sustaining defendants' demurrer complainants appeal. Affirmed.

Keena, Lightner, Oxtoby & Oxtoby, for complainants.

Hinton E. Spalding and *John C. Donnelly*, for defendant Detroit United Railway.

Richard I. Lawson, for defendant city of Detroit.

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The complainants, who are the owners of property abutting on Larchmont avenue, in the city of Detroit, filed this bill of complaint to restrain the construction of the proposed Junction Avenue Crosstown Line, which was to be built under authority of a resolution of the common council of that city, of date September 30, 1913. This action involves the validity of this resolution, which is as follows:

"Whereas, upon the terms of a temporary arrangement between the city of Detroit and the Detroit United Railway, made August 7, 1913 (see Journal Common Council, 1913, pages 1125, 1127), it was understood among other things that the Detroit United Railway would build a crosstown line on or near Junction avenue in connection with existing tracks upon particular lines or streets to be approved by the common council of said city, and that the work of construction should be started in the year 1913 and completed as soon as practical, and that such crosstown line or extension should be constructed and operated under the same terms, in substance, as the Hamilton Boulevard extension was constructed and is being operated (for the terms of said Hamilton Boulevard extension, see Journal Common Council, year 1911, pages 619, 620); and whereas, the said common council has determined upon and fixed the lines or streets upon which said crosstown or junction line or extension shall be located and constructed, to wit: Double track on Junction avenue from West Jefferson avenue to Michigan avenue; thence east on Michigan avenue to Thirty-third street; thence single track on Thirty-third street north to Van Court; thence on Van Court single track north to Larchmont; thence single track on Larchmont east to Grand River avenue; thence north on Grand River avenue double track to Allendale; thence west on Allendale single track to Thornton; thence south on Thornton single track to Thirty-fourth street; thence south on Thirty-fourth street single track to Michigan avenue; thence along Michigan double track to Junction avenue:

"Now, therefore, be it resolved that consent, permission and authority is hereby granted to the Detroit United Railway to enter upon said above-named

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streets and avenues, and construct thereon a street railroad with all necessary side tracks, turnouts, switches, poles, wires and overhead power equipment and connect the same and operate its cars on said streets and avenues under the same terms and conditions under and by virtue of which it is operating that portion of its system constructed under authority of the said Hamilton Boulevard extension above referred to, except as herein otherwise provided.

"And be it further resolved and understood that if the city of Detroit shall be lawfully authorized to engage in the ownership and operation of street railways and shall so engage in such ownership and operation and shall desire to operate a part of its system over said streets and avenues it shall purchase the tracks and equipment constructed under this consent, together with the equipment necessarily furnished and acquired by said company for the operation of cars over and upon said streets and tracks and shall pay therefor a sum of money equal to the cost thereof, less depreciation to be ascertained at the time of the purchase thereof by the city, the same to be agreed upon by the parties hereto or if they should fail to agree the said sum to be determined by a board of arbitrators, one member of which shall be selected by the company, another by the mayor of the city of Detroit, and the third by the two thus chosen, and a decision of said board or a majority thereof shall be final; provided that the board of street railway commissioners of the city of Detroit or any member thereof shall have the supervision of the construction of said tracks and shall have free access to the books and vouchers of said company for the purpose of ascertaining the cost of said tracks and construction together with any other information, in whatever form it may be, which said street railway company may have which shows the cost of such construction.

"And be it further resolved, that in connection with this permit it is further understood that the company will carry passengers over said tracks for the following rates of fare:

"(1) Seven tickets for twenty-five cents, each of which tickets shall be good for a ride for any distance in one direction over said tracks hereby authorized.

"(2) Upon the payment of a fare at the rate of

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seven tickets for twenty-five cents or a five-cent fare a transfer shall on demand be issued to any connecting or intersecting line according to the usual custom.

"(3) The existing provisions now in force on other lines for workingmen's tickets, so-called, eight tickets for twenty-five cents, also shall be in force on said line.

"(4) Single cash fare shall be five cents with now existing transfer privileges.

"Be it further resolved, that it is further understood that said railway company by its acceptance hereof gains no term rights in said streets and avenues by reason of installing the equipment herein permitted, and that the common council or the people of the city of Detroit at their pleasure or caprice may revoke the permit hereby granted and said company shall forthwith remove from the streets and avenues the property permitted to be placed therein by it under this grant.

"It is further understood and agreed between said city of Detroit, said common council and said railway company that the making of this grant and the acceptance thereof by said company shall not be deemed to be a waiver of any rights of said city of Detroit or of said railway company with reference to the construction, maintenance and operation of said line of railway or street railway track now owned, maintained and operated in said city and that each party hereto saves and reserves all its rights whatever they may be the same as though this grant had not been made and accepted.

"Be it further resolved, that the preamble to this resolution be, and the same is hereby constituted, a part and parcel of this resolution and it is so understood.

"And be it further resolved, that this permit is void if not accepted within ten days after its approval by the mayor."

It is contended that this resolution is void because it is in conflict with section 29, article 8, of the State Constitution, which provides:

"SEC. 29. No franchise or license shall be granted by any municipality of this State for a longer period than thirty years"—

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and is also in conflict with section 25, article 8, which provides:

"SEC. 25. No city or village shall have power to abridge the right of elective franchise, to loan its credit, nor to assess, levy or collect any tax or assessment for other than a public purpose. Nor shall any city or village acquire any public utility or grant any public utility franchise which is not subject to revocation at the will of the city or village, unless such proposition shall have first received the affirmative vote of three-fifths of the electors of such city or village voting thereon at a regular or special municipal election; and upon such proposition women taxpayers having the qualification of male electors shall be entitled to vote."

A decree was entered sustaining the demurrers filed by the defendants. Complainants elected to stand on the bill of complaint without amendment, as it set forth all the facts in the case, and the decree accordingly dismissed the bill. From this decree, complainants have appealed.

KUHN, J. *(after stating the facts).* It is the complainants' contention that under section 29, article 8, of the Constitution, the grant in question is invalid, because it contains no maximum term limit beyond which it cannot run, although the right of revocation is reserved to the grantor. What is the grant in question? The most that can be claimed for it is that it is a revocable right. It is immaterial whether it is termed a grant, license, franchise, or permit. Its important feature in this discussion is that whatever it is termed, it is revocable at the will of the city, whenever the public interest requires its termination. By its terms this is to be determined by the common council or the people of the city of Detroit, at their pleasure or caprice. The resolution clearly provides that no term right shall be acquired by the railway company because of the acceptance of the grant by it, and by virtue of the provisions of said section 29, article

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8, of the Constitution, which is a clear limitation on the power to grant franchises or licenses, this grant of power could not extend beyond the period of 30 years fixed by the section, even if it should not be revoked by the granting power before the expiration of that time. In the absence of a time limitation in the grant, it must be assumed that it cannot extend beyond the term fixed by the Constitution. *Boise, etc., Water Co.* v. *Boise City,* 230 U. S. 84 (33 Sup. Ct. 997). Not being a grant for a longer period than 30 years, which is prohibited by the Constitution, and, complying with section 25 of article 8 in that it is "subject to revocation at the will of the city," we are clearly of the opinion that the resolution making the grant was not in violation of any constitutional prohibition.

It is also contended that the council's resolution should be held void because it contains a proviso that, in case the city shall engage in municipal ownership and operation of street railways, and shall desire to operate on the streets mentioned in the resolution, it shall purchase the tracks and equipment therefor at a price to be fixed by agreement or arbitration. This provision cannot be construed to be a limitation upon the power to revoke the permit. This power can be exercised without complying with any conditions. It can be exercised at the will of the common council or the city, and is independent of any other provision. The question of whether or not the city could be compelled to purchase the property and equipment of the railroad as provided for in the resolution, in case the right of revocation is exercised, is a question not involved here.

The decree of the court below dismissing the bill of complaint is affirmed, with costs to defendants.

MCALVAY, C. J., and BROOKE, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

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STATE BOARD OF AGRICULTURE *v.* AUDITOR GENERAL.

1. COLLEGES AND UNIVERSITIES — MICHIGAN STATE AGRICULTURAL COLLEGE—BOARD OF AGRICULTURE—STATUTES.

   The provisions of section 1*a* of Act No. 324, Pub. Acts 1913, providing that no part of the appropriation granted by this act or of any other appropriation for the Michigan agricultural college should be available in case a sum in excess of $35,000 from any or all sources should be expended in any one fiscal year for the maintenance of the mechanical and engineering department, are to be construed as limiting the expenditures for the maintenance of the department specified to $35,000 and to make unavailable for college purposes all of its funds in case the maximum named should be exceeded.

2. SAME—CONSTRUCTION OF STATUTES.

   While the act might stand without this provision if the clause was intended as merely admonitory, the language is not so construed, but is *held* to have been intended as a controlling limitation.

3. CONSTITUTIONAL LAW—COLLEGES—MICHIGAN AGRICULTURAL COLLEGE.

   Under the Constitution, art. 11, §§ 10 and 11, the legislature is required to maintain the agricultural college, and by section 8, the State board of agriculture is given control and supervision of its funds, so that it exceeded the power of the legislature to limit the amount which the board of agriculture might expend to maintain the engineering and mechanical department. Act No. 324, Pub. Acts 1913.

4. SAME—TAXATION.

   The statute being invalid, its provisions for increasing the tax for the benefit of the college to one-sixth of a mill must be declared ineffectual, and it is *held*, that the conditions of section 1*a* were so mutually connected with and dependent on the remainder of the law as to invalidate the entire act.

Mandamus by the State board of agriculture against Oramel B. Fuller, auditor general, to compel respond-

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ent to draw certain warrants on the State treasurer. Submitted April 7, 1914. (Calendar No. 26,187.) Writ granted May 29, 1914.

Stevenson, Carpenter, Butzel & Backus (Beaumont, Smith & Harris, of counsel), for relator.

Grant Fellows, Attorney General, and *L. W. Carr,* Assistant Attorney General, for respondent.

Under the Constitution and laws of the State, money may be drawn from the State treasury only upon the warrant of the auditor general. On the 23d of March last the auditor general declined to draw warrants for certain sums asked for by the State board of agriculture, basing his action upon the legislative declaration found in Act No. 324 of the Public Acts of 1913, which appropriates and orders to be levied for the use of the agricultural college, in the year 1913 and thereafter, annually one-sixth of a mill on each dollar of the taxable property in the State, and concludes as follows:

"SEC. 1 (*a*). No part of this or any other appropriation shall be available in case a sum in excess of thirty-five thousand dollars from any or all sources, shall be expended in any one fiscal year for the maintenance of the mechanical and engineering department."

When the warrants were refused, a sum in excess of the requisitions stood credited to the agricultural college fund. Requisitions previously honored advised the auditor general that a sum in excess of $35,000 had been expended in maintaining the mechanical and engineering department of the college since June 30, 1913.

The State board of agriculture filed its petition for an order requiring the auditor general to draw the refused warrants and such others as it might be entitled to. The auditor general made answer, and,

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upon the petition and answer, there being no disputed facts, the matter has proceeded to a hearing. It is asserted, in concluding the petition, that, if the auditor general's construction of the act of 1913 is the correct one, it prevents relator's performing duties imposed by the Federal statutes and those imposed upon it by the Constitution of the State; that the appropriation, in view of the condition, is not one which it is free to accept or reject. It cannot reject the appropriation without disobeying constitutional mandates; it cannot accept it and perform the condition without denying itself the exercise of constitutional powers. The condition is not within the title of the act. The act may be construed to limit the expenditure of moneys raised by taxation and appropriated by the act, in which case it has been complied with. If it may not be so construed, the condition is altogether unconstitutional, and relator is entitled to receive the appropriation.

In behalf of the respondent auditor general the attorney general contends that:

"An examination of the conditions found in section 1 (*a*) of the act under consideration demonstrates that the provisions are in no wise ambiguous, and there can be no serious question as to the purpose of the legislature in attaching this condition. Undoubtedly it was the same purpose that prompted the condition attached in the regents' case involving the homeopathy department. It is not a question for this Court, we respectfully submit, nor is it a question for the administrative officers of the State, whether the agricultural college shall continue as a competitor against another institution maintained at State expense of over $200,000 per year; nor is it a question for this Court or the administrative officers of the State whether this legislation is wise in policy or not; nor is it a question, we respectfully submit, for relator board to determine. The money in the treasury of the State was the property of the State; none of it was the property of the agricultural college until appropriated by the legislative branch of the State government. That branch of the State government has the

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exclusive control of appropriations to State institutions, and may prescribe the amount and condition upon which any of the public institutions of the State can withdraw the same. If, in the wisdom of the legislature, it is inadvisable to continue two appropriations to two institutions which are duplicating work in the State, neither the courts, the administrative officers, or administrative boards can set aside such action.

"Relator understood clearly the conditions under which this appropriation was made; it understood clearly that, if the act was valid, its engineering department must be curtailed; and, while protesting against the power of the legislature to attack such conditions, it continued to make its requisitions upon the auditor general and to receive the money appropriated to it under this and other acts, and to use such money contrary to the conditions found in this act. The people, by the Constitution of 1908, gave to relator powers never before possessed by the controlling board of the agricultural college, the same powers exercised by the regents of the university, but they still reserved to their representatives chosen each two years the right to determine the appropriations to be made, not only to the other State institutions, but also to the university and the agricultural college. The respondent is but carrying out the conditions imposed under the act in question. Relator's present position, if unfortunate, arises from its failure to recognize that the legislature, and the legislature alone, holds the purse strings of the State."

To understand and to dispose of the contention presented, it is necessary to refer to facts appearing in the pleadings or evidenced by the Constitution of the State and Federal and State statutes. By the Constitution of 1909 the State board of agriculture is made, what before it was not, a constitutional board and body corporate. It is given general supervision of the college and direction and control of "all agricultural college funds." Article 11, § 8. Sections 10 and 11 of article 11 read, respectively, as follows:

"SEC. 10. The legislature shall maintain the uni-

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versity, the college of mines, the State agricultural college, the State normal college, and such State normal schools and other educational institutions as may be established by law.

"SEC. 11. The proceeds from the sales of all lands that have been or hereafter may be granted by the United States to the State for educational purposes and the proceeds of all lands or other property given by individuals or appropriated by the State for like purposes shall be and remain a perpetual fund, the interest and income of which, together with the rents of all such lands as may remain unsold, shall be inviolably appropriated and annually applied to the specific objects of the original gift, grant or appropriation."

Agricultural college funds, when the Constitution was adopted, consisted of sums paid for tuition, receipts from sales of products of the institution, a grant of money by the Federal government, the interest paid by the State upon money received from sales of land granted by the Federal government (the proceeds of the sales having been covered into the State treasury), and, lastly, the proceeds of a tax of one-tenth of a mill levied annually upon the valuation of taxable property of the State pursuant to the provisions of Act No. 232 of the Public Acts of 1901 (4 How. Stat. [2d Ed.] § 9808). The condition attached to the Federal grant of lands was:

"That all moneys derived from the sale of the lands aforesaid by the States to which the lands are apportioned, and from the sales of land scrip hereinbefore provided for, shall be invested in stocks of the United States or of the States, or some other safe stocks, yielding not less than five per centum upon the par value of said stocks; and that the moneys so invested shall constitute a perpetual fund, the capital of which shall remain forever undiminished (except so far as may be provided in section fifth of this act), and the interest of which shall be inviolably appropriated, by each State which may take and claim the benefit of this act, to the endowment, support, and maintenance

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of at least one college, where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislature of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life."

And the Federal grants of money were made to the State for the more complete endowment and maintenance of such agricultural college as had been or might be established in accordance with the original land grant act. Formal acceptances of the Federal bounty were made by the legislature (Acts Nos. 46 and 140, Session of 1863; Act No. 80, Session of 1891), and it was formally devoted to the maintenance of the agricultural college. Including the interest paid by the State, the proceeds of Federal bounty amount to more than $120,000 annually. Although one purpose of the Federal grants was the teaching of mechanic arts, and instruction was in some degree afforded in mechanic arts, it was more than 20 years after the first grant was made before a mechanical department was established at the college. Act No. 42, Public Acts 1885. Since it was established, the State board of agriculture has been repeatedly expressly charged with the maintenance of the department. Section 15 of Act No. 188, Public Acts of 1861, an act which reorganized the college, provides a course of instruction as follows:

"The course of instruction shall embrace the English language and literature, mathematics, civil engineering, agricultural chemistry, animal and vegetable anatomy and physiology, the veterinary art, entomology, geology, and such other natural sciences as may be prescribed, technology, political, rural and household economy, horticulture, moral philosophy, history, bookkeeping, and especially the application of

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science and the mechanic arts to practical agriculture in the field."

To refer to no other instances, in Act No. 232, Public Acts of 1901, is found the following condition:

"The Michigan State board of agriculture shall maintain at all times a sufficient corps of instructors in all the courses of study of the agricultural college as at present constituted, * * * the same being known as the agricultural department, the mechanical department and the woman's department; * * * and shall make a fair and equitable division of the funds provided by this act in accord with the wants and needs of said courses of study. * * *"

And the concluding language of the section is:

"Should the State board of agriculture fail at any time to maintain any of said departments as herein provided, the terms of this act shall be suspended until further action by the legislature."

The mechanical department has grown in importance until it now represents an investment of more than $227,000. To maintain it during the year ending June 30, 1913, there was expended $27,000 for supplies, machinery, and maintenance of buildings, and about $34,000 for salaries of professors and instructors.

Following the enactment of the law in question here and before any money had been drawn under it, the State board of agriculture made a statement in writing, copies of which were sent to the State officers, in which statement, after reviewing the history of the mechanical and engineering department of the college and the Federal and State legislation pertaining thereto, the following conclusions are set forth:

"The board is advised by reputable legal counsel, and it believes, that under the Constitution of the State, the legislature has no authority to enact the limiting provision hereinbefore first referred to, and especially that it had no power to limit or determine the use of the Federal funds. However, without in any

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manner accepting the provisions of said limitation, and without waiving our right to insist upon its invalidity, we respectfully make the following declaration of our intention in reference to said mechanical and engineering department:

"(*a*) We shall continue that department as now conducted and as it may legitimately grow and develop.

"(*b*) We shall limit the annual expenditure of State funds in this department to $35,000.00.

"(*c*) For the remainder of the necessary expenditure we shall use a sufficient portion of the funds of the Federal government.

"(*d*) The secretary is instructed to mail certified copies of this statement, and the action of the board in reference thereto, to the governor, the auditor general, the State treasurer, the attorney general and to the president of the senate and the speaker of the house."

As matter of bookkeeping, the auditor general credits the agricultural college fund with all moneys belonging to it. During the fiscal year beginning July 1, 1913, and until the month of March, 1914, requisitions upon the fund were honored until a sum in excess of $400,000 had been paid upon the requests of the State board of agriculture, there remaining in the fund in March, 1914, when further demands were refused, a sum in excess of $190,000.

OSTRANDER, J. *(after stating the facts).* In attempting to find the meaning to be given to section 1 (*a*), it will be assumed that the legislature knew that, independent of the immediate appropriation, there was a fund already devoted to the needs of the college larger than any sum likely to be used to maintain the particular department. If the purpose was to limit the total sum which should be expended to maintain that department, it could not be accomplished by limiting the amount which might be taken from the immediate appropriation. If there was no

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purpose to limit the total amount which might be expended, the provision is wholly insensible. In any event, the words "from any and all sources" may not be disregarded. Section 1 (*a*) cannot be held as intended merely to place a limitation upon the amount to be taken from the immediate appropriation to be used in maintaining the mechanical and engineering department.

While no reading and no analysis of the language employed leaves one entirely certain of the meaning of the provision, it seems most reasonable to say that the purpose was to limit expenditures for maintaining the particular department to $35,000 annually, and to make unavailable for the use of the college all of its funds in case the maximum thus fixed was exceeded. I do not overlook the language, "No part of this or any other appropriation shall be available," nor the actual occurrence of a result which was inevitable; namely, that unless the declaration of the relator board was to be accepted for the fact some part of the immediate and of other appropriations would of necessity be available, if the college was to continue to exist, since it could not be known before the fact whether relator would or would not expend more than $35,000 in maintaining the particular department. Some question might be raised also about the meaning of the words "or any other appropriation." The reference might be to an unexpended appropriation or the term "appropriation" used to designate, and not improperly, the earlier legislation which devoted the Federal gifts to the maintenance of the college. But I think we must say that the legislative purpose expressed in this statute is the one to which the respondent has given effect, and, assuming the law to be valid, respondent cannot be required to issue to relator further warrants for money.

We must either say this, or else conclude that section 1 (*a*) was added to the act as an admonition, and

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not a command, or a condition; that it expresses the opinion of the legislature with respect to the manner in which the agricultural college funds shall be employed. If it was an admonition merely, the act could, of course, stand without it. Because of the language employed in section 1 (*a*) I do not feel warranted in concluding that it is admonitory only. It is therefore necessary to determine whether the legislature has, as it is claimed, exceeded its constitutional powers, and, if it has, then the state of the applicable law.

If section 1 (*a*) be held to be valid, its effect would be legislative supervision of the college. To determine that a department of the college which has been maintained at a cost of $60,000 annually for instructors and supplies shall be from a given date maintained at a cost of $35,000 annually for instructors and supplies is to determine that it shall have fewer supplies, or fewer, or less capable, instructors, or both. It is something more than reducing a general appropriation so that the expenses in some or in all departments of the college must be reduced, leaving the proper supervisors to determine how efficiency can be best maintained under new conditions. The Constitution has given to the relator the general supervision of the college and the direction and control of all agricultural college funds. So long as the relator employs them for the purposes intended by the grant, it is beyond the power of the legislature to control the relator's use of the funds received from the Federal government and long ago appropriated to the agricultural college. Undoubtedly the grant of funds was to the State, and the disposition of them wholly within the power of the State, acting through its legislature, in accordance with the conditions of the trust imposed. *Montana, ex rel. Haire,* v. *Rice,* 204 U. S. 291 (27 Sup. Ct. 281); *Wyoming, ex rel. Wyoming Agricultural College,* v. *Irvine,* 206 U. S. 278 (27 Sup. Ct. 613). See, also, *Massachusetts Agricultural Col-*

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lege v. *Marden*, 156 Mass. 150 (30 N. E. 555). I am called upon to neither affirm nor deny the proposition that the legislature may now appropriate the Federal fund, in whole or in part, to some other institution, withdrawing it, or some of it, from the agricultural college, so long as it keeps faith with the congress. The legislature has not withdrawn it from the college nor appropriated it, or any part of it, to another institution. It remains an *agricultural college fund*, within the meaning of the Constitution, devoted, under the supervision and direction of the relator, to the college and to the purposes expressed in the grant, in State legislation, and, finally, in the Constitution of the State. It is required to be "annually applied to the specific objects of the original gift, grant or appropriation." Necessarily it must be so applied, under existing conditions, by the constitutional supervisors of the fund, and of the college, and not by the legislature. It follows that the legislature exceeded its powers in attempting to deprive the relator of its constitutional control of agricultural college funds derived from the Federal government. The constitutional powers of the State board of agriculture with respect to the college and its funds are the same as those of the board of regents of the university with respect to the university and its funds, and authority for the conclusion stated may be found in *Sterling* v. *Regents of the University*, 110 Mich. 369 (68 N. W. 253, 34 L. R. A. 150); *Board of Regents* v. *Auditor General*, 167 Mich. 444 (132 N. W. 1037), as well as in *Bauer* v. *State Board of Agriculture*, 164 Mich. 415 (129 N. W. 713).

I assume that the legislature, in amending the original bill by adding section 1 (*a*) thereto, acted in good faith and with the highest motives. I am obliged to find that in doing so constitutional powers were exceeded. I am obliged to find, further, that the legislative intent was to deprive the college of all funds,

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however derived, upon the contingency expressed in the act. This being so, the question is whether it can be said that the act would have passed without the condition.

In deciding this question, we are not concerned with, do not inquire into, and cannot know the purpose and intent of legislators. We must look at the law itself and judicially ascertain the intent of the legislature.

"If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail unless sufficient remains to effect the object without the aid of the invalid portion. And if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently, then if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them." Cooley's Constitutional Limitations (6th Ed.), p. 211.

There are some facts which we may and do know which aid us in this inquiry. We know that in the year 1901, and until the year 1913, the State appropriation for the agricultural college was one-tenth of a mill. In 1913, by the act in question here, this appropriation was increased, upon condition, to one-sixth of a mill. The appropriation made in 1901 does not fail if the act of 1913 is held invalid. The college will still receive the proceeds of a tax of one-tenth of a mill upon the taxable property of the State, and it appears that upon this basis something remains in the treasury. It is contended that the decision of this court in *Moreland* v. *Millen*, 126 Mich. 381 (85 N. W. 882), supports the ruling that the act may stand, notwithstanding the invalid condition, and that

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to hold otherwise is to overrule the decision in that case. I have read the opinions delivered in that case with care and with no disinclination to sustain the relator in this controversy. The cases seem to me to be wholly unlike. For the purposes of the decision in that case, it was assumed in the majority opinion that the legislature, in the act there in question, sought to improve the method of administering public works in the city of Detroit. The act made radical changes in the existing law. It provided finally that a superintendent of public works should be appointed, for a designated, but short, period of time, by the governor of the State, and thereafter by the mayor of the city. It was held that the legislature exceeded its powers in providing for the provisional appointment, but that the whole law was not thereby made invalid. It was held further that, an office having been created by the act, the mayor might proceed at once to fill it by appointment. In that case the invalid portion of the act provided for a mere detail; in this case it is the condition upon which an increased appropriation is made. It is as though the legislature, in 1913, had for that year, and each succeeding year, provided a fund for the college, and for a further sum to be given it upon condition.

The whole act must fail, and, this being so, the respondent should be advised (it is unlikely that a writ will be necessary) that the act of 1913 is void; that the act of 1901 is in force; that the fund derived from the Federal government and a fund equal to the one created by that act are within the control of the relator.

MCALVAY, C. J., and BROOKE, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

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LEHMAN *v.* DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY CO.

1. ATTORNEY GENERAL—FEE—CONTINGENT COMPENSATION.
   Where plaintiffs made with an injured party an oral agreement to take his case as attorneys and prosecute the claim for one-third of the proceeds if the client should pay expenses, and, if not, the attorney should have 50 per cent. of the amount to be secured, and where plaintiffs proceeded with the suit and the client paid none of the costs and defendant settled with the client direct after having notice of the contingent contract, there was evidence to sustain a verdict for plaintiffs for half the amount obtained by the compromise.

2. CHAMPERTY AND MAINTENANCE—CONTRACTS—VALIDITY.
   Although it was champertous at common law to agree to divide the subject matter of litigation between client and attorney, and for the latter to advance the expense of suit, the former rule has been abolished in Michigan by statute. 3 Comp. Laws, §§ 10054, 11254 (5 How. Stat. [2d Ed.] §§ 12704, 14432).

3. ATTORNEY AND CLIENT—NOTICE—COMPROMISE.
   Evidence that plaintiffs, in a suit to recover their share of proceeds secured by a client in compromising a personal injury claim, had notified the defendant railroad and all its attorneys that they had the case on a contingent basis, presented a question of fact for the jury on the issue of notice.

4. SAME.
   Held, also, that a verdict for plaintiffs was not contrary to the weight of the evidence.

Error to Wayne; Hosmer, J. Submitted November 13, 1912. (Docket No. 4.) Decided June 1, 1914.

Case by Michael J. Lehman and others against Elmer Wood, the Detroit, Grand Haven & Milwaukee Railway Company, Harrison Geer, and others. Judgment for plaintiffs. Defendants bring error. Affirmed.

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W. V. Butler, for appellants.

Frank C. Moriarty, for appellees.

BIRD, J. It is the claim of the plaintiffs, who were practicing attorneys in the city of Detroit in August, 1909, that they were employed by one Elmer Wood to prosecute a personal injury case for him against the defendant railroad company for injuries which he received from a gunshot wound at the hands of one of the company's detectives. After Wood received the injury, he was removed to a hospital, where plaintiff Lehman visited him at his request. Mr. Lehman made him a proposition that he would take the case if the necessary expenses were paid for one-third of what he recovered by suit or compromise, and, if he (Wood) did not pay the expenses, he would retain 50 per cent. of what was recovered. If nothing was recovered, no charge would be made. It is claimed defendant Wood accepted this proposition and requested plaintiffs to commence suit at once, as he was then uncertain as to whether he would survive his injuries. In pursuance of this understanding, plaintiffs commenced the suit, paid the filing fee to the clerk and the sheriff's fee for making service of the process, attended the trial of the criminal case against the detective, made investigations, took the deposition of plaintiff Wood, and looked up witnesses. After rendering these services, the case was compromised for $1,200 by the attorneys for the railroad company directly with Wood, through the intervention of Mr. Murphy, the employer of Wood. It was claimed by plaintiffs that they notified Mr. Murphy and all of the attorneys representing the railroad company before the settlement was made that they had the case upon a contingent basis. Failing to receive their fees in accordance with their contract, they brought this suit to enforce them against Wood, the railroad company, its attorneys, and Mr. Murphy.

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The questions raised by defendants' assignments of error are:

(1) Was there a completed contract between the parties?
(2) If there were one, was it a void contract?
(3) Should a verdict have been directed in behalf of defendants Geer, Williams, and Murphy?
(4) Was the verdict against the weight of the evidence?

1. The testimony disclosed that Mr. Lehman stated to Mr. Wood the terms upon which he would take the case, namely: One-third of the amount recovered if Wood paid the expenses, and 50 per cent. if he did not. There is testimony to the effect that Wood assented to this proposition and requested Mr. Lehman to proceed with the suit at once, and that afterwards Wood neither paid nor offered to pay any of the expenses. This testimony was sufficient to justify the jury in finding that Wood accepted the 50 per cent. proposition.

2. It is urged that, if the contract were a completed one, it is invalid by reason of the agreement of plaintiffs to pay the necessary expenses of the litigation. It is conceded that since the passage of section 11254, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 14432), it has been lawful for an attorney to contract with his client on a contingent basis with respect to his fees, but that he may not agree to pay the expenses of the litigation because it is in violation of section 1136, 1 Comp. Laws (5 How. Stat. [2d Ed.] § 12554). That section provides that:

"No attorney, solicitor or counselor, by himself, or by or in the name of any other person, shall lend or advance, * * * or procure to be lent or advanced, any money, or any bond, bill of exchange, draft or other thing in action, to any person, as an inducement to the placing, or in consideration of having placed, in the hands of such attorney, solicitor or

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counselor, or in the hands of any other person, any debt, demand, or thing in action, for collection."

By the common law, champerty was defined to be "a bargain with a plaintiff or defendant to divide the land or other thing sued for between them if they prevail at law; the champertor agreeing to carry on the suit at his own expense (citing Bouvier's Institutes of American Law, vol. 4, p. 236)." *Backus* v. *Byron*, 4 Mich. 535. The facts upon which plaintiff recovered in this case are clearly within the common-law definition of champerty, and are also within the inhibition of the foregoing statute. But it is contended by the plaintiffs that subsequent legislation in this State has wiped away the common and statute law with reference to champerty. The first inroad made upon them was "when the legislature enacted that lands in the adverse possession of another might be conveyed, and also that choses in action might be assigned," and it is doubtful whether the laws relating to champerty have had any place in our jurisprudence since the passage of those statutes. *Wildey* v. *Crane*, 63 Mich. 720 (30 N. W. 327). But, if they have, the passage of Act No. 58 of the Laws of 1867 (3 Comp. Laws, § 11254 [5 How. Stat. (2d Ed.) § 14432]), would seem to have completed what the other statutes began. That section in part provides:

"That all existing laws, rules, and provisions of law, restricting or controlling the right of a party to agree with an attorney, solicitor, or counsel, for his compensation, are repealed, and hereafter the measure of such compensation shall be left to the agreement, express or implied, of the parties."

This statute has been construed frequently by this court, and, on several occasions where the facts have been similar to those under consideration, it has followed *Wildey* v. *Crane, supra,* in holding that common-law champerty was repealed by the foregoing statute. *Town* v. *Tabor,* 34 Mich. 262; *Wildey* v.

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Crane, 63 Mich. 720 (30 N. W. 327); *Denman* v. *Johnston,* 85 Mich. 387 (48 N. W. 565); *Smedley* v. *Dregge,* 101 Mich. 200 (59 N. W. 411); *In re Service's Estate,* 155 Mich. 179 (118 N. W. 948); *Foley* v. *Railway Co.,* 157 Mich. 67 (121 N. W. 257); *Grand Rapids, etc., R. Co.* v. *Cheboygan Circuit Judge,* 161 Mich. 181 (126 N. W. 56, 137 Am. St. Rep. 495); *Dreiband* v. *Candler,* 166 Mich. 49 (131 N. W. 129).

Section 1136 was an early statute, and, as it was in affirmance of the provisions of common-law champerty, we are of the opinion that it, too, was abrogated by sections 11254 and 10054.

3. It is said that a verdict should have been directed in behalf of defendants Geer, Williams, and Murphy. This contention is without much force when Mr. Lehman's testimony is considered, that he advised Mr. Murphy and all the attorneys of the railroad before the settlement was made that he had the case on a contingent basis. This testimony made the question of notice one of fact for the jury.

4. There was much conflict in the testimony on some of the material questions involved in the case; these questions were submitted to a jury, and we do not think the court was in error in refusing to set aside their verdict on the ground that it was against the weight of the evidence.

The judgment is affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

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CHIODO v. WILLIAMS.

1. EQUITY—PRACTICE—TAXATION—WRIT OF ASSISTANCE.
   Under Act No. 211, Pub. Acts 1905 (1 How. Stat. [2d Ed.] § 2021), making the deed of the State land commissioner *prima facie* evidence of title, a petition for writ of assistance to obtain possession of tax homestead lands purchased by third parties and conveyed to the petitioner, was sufficient without alleging the regularity of the proceedings leading up to the issuance of such deed where the petition showed the due execution and delivery of State deeds and making of a demand on the defendant, who was in possession and to whom the petitioner exhibited the deeds conveying title to him.

2. SAME—WRIT OF POSSESSION—EJECTMENT—REMEDY.
   The trial court correctly held that a writ of possession was the proper remedy to put the purchaser of tax homestead lands in possession, that the action of ejectment was not the sole remedy. 1 Comp. Laws, § 3959, as amended (1 How. Stat. [2d Ed.] § 1911).

3. TAXATION—STATE TAX LANDS.
   After six months from the date on which deeds to the State of tax homestead lands have been recorded under section 127 of the general tax law, Act No. 107, Pub. Acts 1899 (1 How. Stat. [2d Ed.] § 1898), the owner of the premises is precluded from contesting the validity of the proceedings.

Appeal from Muskegon; Sessions, J. Submitted January 13, 1913. (Docket No. 85.) Decided June 1, 1914.

Petition by Emanuel Chiodo against John Williams for a writ of assistance. From an order granting the writ, defendant appeals. Affirmed.

Turner & Turner, for appellant.

Cross, Vanderwerp, Foote & Ross, for appellee.

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BIRD, J. The petitioner applied to the Muskegon circuit court, in chancery, for a writ of assistance to put him into possession of lot No. 8, block 156, revised map of 1903, in the city of Muskegon, which had been deeded to the State by the auditor general under the provisions of the general tax law in December, 1908. Following the deed to the State, the parcel was withdrawn from homestead entry by the auditor general and commissioner of the State land office, and afterwards restored to the market, and in October, 1909, was sold by the commissioner of the State land office to Alfred Davidson and Herman Woycke, who received a deed therefor; the same being issued in pursuance of section 131, Act No. 206 of the Public Acts of 1893, as amended. A year later, in October, 1910, Davidson and Woycke conveyed the same to petitioner, and he caused a demand for possession to be served upon the defendant, the former owner, who was yet in possession, at the same time exhibiting to him the deed from the commissioner of the State land office to Davidson and Woycke, and also their deed to petitioner. The defendant resisted the demand, and this proceeding was instituted, and, after a hearing thereon, it resulted in an order granting the writ. From this order, defendant appeals.

1. The sufficiency of the petition is attacked for want of proper allegations showing the regularity of the tax proceedings leading up to the giving of the deed by the commissioner. The petition alleged that the petitioner's grantors received a deed of the land in question from the commissioner of the State land office for the consideration of $225, in pursuance of section 131, Act No. 206 of the Public Acts of 1893, as amended, and that the same was duly recorded in the county of Muskegon on the 19th day of October, 1909, and that the said parcel was thereafter conveyed by Davidson and Woycke to petitioner; that following the conveyance to petitioner he caused a demand

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for possession to be served on defendant, together with an exhibition to him of the aforesaid deeds. These allegations were sufficient when considered in connection with Act No. 211 of the Public Acts of 1905 (1 How. Stat. [2d Ed.] § 2021), making the deed of the commissioner in such cases *prima facie* evidence of title in fee. *Griffin* v. *Kennedy*, 148 Mich. 588 (112 N. W. 756); *Beuthien* v. *Dillon*, 160 Mich. 396 (125 N. W. 363).

2. The further objection is made that petitioner has mistaken his remedy; that a writ of assistance will not lie because that writ is always, under our practice, based upon a decree of the court; but that ejectment is the proper remedy.

Counsel, in making this point, overlook the fact that, when the State acquired the title to this lot, it was perforce of at least one decree of a court of equity, and it may have been perforce of more than one decree. No reason is suggested under the general practice why the State would not have been entitled to a writ of assistance had it applied for one before it parted with the title. If the State were entitled to the writ, it would follow that a court of equity would have the power to issue one in behalf of the grantee of the State. 3 Standard Enc. of Procedure, 143; *Ketchum* v. *Robinson*, 48 Mich. 618 (12 N. W. 877). But whether it is consistent with the general practice or not, the legislature having declared in positive terms that the purchaser may be put into possession by the circuit court, the question of practice must be regarded as settled. Section 137 of the tax law (1 How. Stat. [2d Ed.] § 1907), provides that:

"The circuit court may, on application, put the purchaser of any lands sold under the provisions of this act in possession of the premises by writs of assistance."

Section 140 provides that no writ of assistance shall

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issue until six months after the statutory notice shall be served, "except where such title shall be obtained under the provisions of section 131 of this act."

The title involved in this proceeding having been obtained under said section 131, there would seem to be no valid objection to the petitioner enforcing his right of possession by a writ of assistance.

3. Defendant offers various other objections to the validity of the commissioner's deed to petitioner's grantors; but it would be without profit to consider them, as we are of the opinion that he is in no position to contest the validity of the deed. The statute gave him six months after the deed to the State was recorded in Muskegon county to contest its validity. Having failed to question the proceedings within that time, he will now be precluded from doing so. Section 127, general tax law; *Beuthien* v. *Dillon, supra.*

The order is affirmed, with costs to the petitioner.

McALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

HYMAN *v.* KADROVACH.

1. JUSTICES OF THE PEACE—APPEAL—AMENDMENT—AFFIDAVIT.
   If the affidavit which is required in case of an appeal from justice's court is lost or mislaid, the circuit court may permit another one to be filed upon a sufficient showing that the affidavit was in fact filed. 1 Comp. Laws, § 10276 (5 How. Stat. [2d Ed.] § 12977).

2. SAME—BOND—AMENDMENT.
   The court also has authority to permit the appellant to

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amend the bond given on appeal so as to comply with the statute as to justification by the surety. 1 Comp. Laws, § 922 (5 How. Stat. [2d Ed.] § 12368).

Error to Leelanau; Mayne, J. Submitted November 13, 1913. (Docket No. 113.) Decided June 1, 1914.

Case in justice's court by Herman Hyman against Joseph Kadrovach. From a judgment for defendant, plaintiff appealed to the circuit court. Judgment for plaintiff. Defendant brings error. Affirmed.

John W. Patchin, for appellant.

Fred H. Pratt, for appellee.

BIRD, J. This litigation was begun in justice's court. The defendant was there given a judgment on the 29th day of July, 1910. On August 2d following the plaintiff appealed the case to the circuit court. At the outset of the trial in the circuit court defendant's counsel moved to dismiss the appeal for the reasons:

(1) That no affidavit for appeal was on file in the circuit court.
(2) That the surety on the appeal bond had failed to justify his pecuniary responsibility in writing and under oath.

These objections being called to the attention of the trial court, recourse was had to the files of the case, and after an examination of them the reasons assigned appeared to be well taken; whereupon plaintiff's attorney asked for and received permission to remedy the omissions on condition that he should make a showing on oath that an affidavit was filed with the justice. The court then ordered the trial to proceed, suggesting that the amendment of the record might be perfected later. During the trial the motion to dismiss was renewed, but was overruled, and the corrections were not actually made until after verdict. Following the verdict, and on the same day, a showing

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was made, a new affidavit filed, and a justification by the surety was indorsed on the bond.

It is now argued by defendant that the action of the trial court in permitting the trial to proceed to verdict without an affidavit for appeal on file was error, for the reason that, without such affidavit, the court was without jurisdiction.

In the return of the justice the following recital is made:

"And I do further return that the affidavit and bond herewith returned were delivered to me on the 2d day of August, 1910, instant," etc.

From this return and the affidavit of plaintiff that he filed an affidavit on the 2d of August, it sufficiently appears that an affidavit for appeal was filed. If it were mislaid or lost, it was within the power of the trial court to permit another one to be filed. The amendment appears to have been permitted under the authority of section 924, 1 Comp. Laws (5 How. Stat. [2d Ed.] § 12370), which provides that no appeal shall be dismissed upon the ground of a defective affidavit, if appellant shall file one which shall meet the requirements of the statute.

This section is not applicable. The objection made was, not that the affidavit *was defective*, but that there was *no* affidavit. The situation disclosed by the record is that the affidavit was made and filed with the justice and returned by him to the circuit court and subsequently became mislaid or lost. The statute with reference to the restoration of lost records would be applicable thereto (section 10276 *et seq.* [5 How. Stat. (2d Ed.) § 12977]), and we think the showing made by plaintiff was sufficient under this statute to justify the order made by the court.

In permitting the appeal bond to be amended so as to comply with the statute, the court was well within his authority. 1 Comp. Laws, § 922 (5 How. Stat.

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[2d Ed.] § 12368). This statute was passed to meet just such a situation. The defendant raises no questions other than those affecting the appeal.

As we find no error in those assignments, the judgment will be affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

WESTOVER v. GRAND RAPIDS RAILWAY CO.

1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—PERSONAL INJURIES.
An ordinarily prudent man in crossing a highway or street car track will be watchful of any vehicle or street car which he may observe approaching, until he has passed the danger point and reached a place of safety: it is the duty of a driver to keep observing an approaching street car sufficiently to enable him to determine the safety of his course.[1]

2. STREET RAILWAYS—PERSONAL INJURIES—HIGHWAYS.
In an action for wrongful death of a passenger who was killed in an automobile when it attempted to cross the track of a street railway company, the driver claiming that he looked and saw a car but believed he had sufficient time and proceeded to cross the track, the trial court did not err in charging the jury that it was the duty of the driver to observe the speed of the car from the time he first saw it until he went upon the track: merely looking at the car once at a distance was not enough, and the language should be construed to mean that the driver's duty required him to continue his observation sufficiently to enable him to verify the safety of his decision.

[1] As to the duty of the operator of an automobile when near street cars, see note in 38 L. R. A. (N. S.) 493.

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3. NEGLIGENCE—AUTOMOBILES—MOTOR VEHICLE LAW—SPEED.
Nor was it error to instruct the jury that the driver on approaching the intersection of two streets must have his automobile under control and operate it at such speed as was reasonable and proper and if he failed to do so he was guilty of contributory negligence; that the motor vehicle law forbids the operation of a motor car on a city street at more than 15 miles an hour and failure to observe this rule would be negligence: there was no impropriety in defining the statutory duty of those driving automobiles on the highway.

4. SAME—SPEED.
Violation of the statutory regulation as to speed was negligence *per se* and would bar plaintiff's recovery.

5. SAME.
Held, also, that the charge of the court to the effect that the street car ordinarily has the right of way, as modified by an explanation of the duty of the motorman to keep his car under control and check it so as to avert peril to those who are making lawful use of the streets, was not erroneous or misleading.

Error to superior court of Grand Rapids; Stuart, J. Submitted January 24, 1913. (Docket No. 31.) Decided June 1, 1914.

Case by Carrie M. Westover, as executrix of the estate of Charles M. Westover, deceased, against the Grand Rapids Railway Company for the unlawful killing of plaintiff's intestate. Judgment for defendant. Plaintiff brings error. Affirmed.

George E. Nichols, for appellant.

Kleinhans & Knappen (M. L. Dunham and *Charles E. Ward*, of counsel), for appellee.

BIRD, J. In the early evening of November 3, 1910, Henry J. Horrigan was driving his automobile in a westerly direction on Briggs avenue, in the city of Grand Rapids. In the automobile with him were his wife and her parents, Mr. and Mrs. Westover. It

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was his intention, when he reached the intersection of Briggs and Grandville avenues, to cross over the street car tracks and drive south on Grandville avenue. As he approached Grandville avenue, he looked to the south and saw the headlight of an approaching street car. His estimate of the distance it was away was 200 feet. He was going from 6 to 8 miles an hour, and concluded he could cross in safety before the street car arrived at the intersection. He proceeded across; but before he cleared the east track the car struck the automobile, turning it over, and throwing the occupants out, and injuring Mr. Westover so badly that he died within a few hours thereafter. Mrs. Westover, the widow, brings this suit, as executrix, to recover for the negligent killing of her husband. The negligence complained of was the excessive speed of the car, a failure to observe the ordinance, which limits the speed to 15 miles an hour, and the failure of the motorman to have the car under control in passing the intersection of these avenues. The defendant denied the charge of excessive speed, denied that it violated the ordinance, and charged that the driver of the automobile was guilty of contributory negligence in attempting to cross in front of the car, and also in operating his automobile at an excessive and unreasonable speed. Upon these issues the case was tried and submitted to the jury, who returned a verdict for the defendant. The plaintiff brought error, and her principal assignments of error are based upon the charge of the court.

One portion of the charge complained of is as follows:

"(1) If you find that Horrigan was inattentive to the rate of speed at which the car was coming, that would be negligence on his part, as it was his duty under the circumstances to have noticed the speed at which the car was coming, as far as he could do so. *It was Mr. Horrigan's duty to observe the speed of*

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the car from the time he first saw it and up to the time he went onto the track. Merely looking at the car once at a distance was not enough; he should have continued to observe the speed until he got to the track, and if he failed to do this, the plaintiff cannot recover."

That portion of the charge which appears in italics is attacked on the ground that it instructed the jury that the driver of the automobile was guilty of negligence if he did not continue to observe the street car from the time he first saw it until he went onto the track. The driver testified that, when within 5 or 6 feet of the east line of Grandville avenue, he first saw the approaching headlight. He thought the car was then 200 feet away. He had to travel 6 feet to Grandville avenue and upwards of 24 feet beyond that to a place of safety. If, when he had gone half that distance, another observation had convinced him that it was dangerous to cross ahead of the car, it would have been his duty to stop. We think it can be said as a matter of law that, when an ordinarily prudent person is about to cross a highway, whether on foot *(Zoltovski* v. *Gzella,* 159 Mich. 620 [124 N. W. 527, 26 L. R. A. (N. S.) 435, 134 Am. St. Rep. 752]), on a bicycle *(Measel* v. *Railway,* 166 Mich. 688 [132 N. W. 453]), or in a carriage or automobile, and he observes an approaching street car or any other vehicle which may obstruct his passage, he is watchful of it or them until he has passed the danger point and reaches a place of safety. As to whether he has done so in any given case is usually a question of fact to be determined from all the circumstances by a jury. But counsel argue that the rule laid down by the court is too strict, in that it placed the duty upon the driver to look continually at the car after he first saw it until the danger of collision was passed. A fair construction of the language means that it was the duty of the driver to continue his observation sufficiently after he first

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saw it to enable him to verify the safety of his decision, or to revise it if necessary to avoid a collision. This is a reasonable construction of the language used by the court, and is a reasonable requirement, and one usually followed by ordinarily prudent people when crossing the highway.

The court, in compliance with defendant's requests, instructed the jury that:

"The statutes of the State also required Mr. Horrigan, on approaching the intersection of Grandville avenue and Briggs avenue, to have his automobile under control, and to operate it at such speed as was reasonable and proper, having regard to the traffic then on Grandville avenue, and for the safety of the public, and if he failed to do so, he was negligent, and, if this negligence contributed to Mr. Westover's death, the plaintiff cannot recover. The statutes of this State made it unlawful for Mr. Horrigan to operate his automobile on Briggs avenue at a higher rate of speed than 15 miles an hour. If, approaching Grandville avenue, he was running his automobile at a greater rate of speed than 15 miles an hour, he was guilty of negligence, and if such negligence in any degree contributed to the accident, plaintiff cannot recover."

These instructions were evidently based upon Act No. 318 of the Public Acts of 1909 (2 How. Stat. [2d Ed.] §§ 2487, 2493), known as the automobile law. The criticism made upon the first paragraph is that it was not applicable to the facts as they were established by the proofs. In view of the claims made by defendant on the trial, that the driver of the automobile was guilty of contributory negligence in operating his automobile at a speed which was improper and unreasonable, and in excess of that prescribed by the statute, we see no impropriety in defining to the jury the statutory duty of those driving automobiles upon the public highway.

The other paragraph is criticised because the court instructed the jury that, if the driver of the automobile was running his car at a speed in excess of 15

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miles an hour, he was guilty of negligence. It is said that, even if he were operating the automobile at a speed in excess of 15 miles an hour, it was not negligence *per se*, but only evidence of negligence. It is argued that this instruction was error, and was harmful to the plaintiff's case.

In some jurisdictions it has been held that a violation of an ordinance or a statute is negligence *per se;* but this court has not followed that rule with reference to violations of ordinances. *Cook* v. *Johnston*, 58 Mich. 437 (25 N. W. 388, 55 Am. Rep. 703); *Flater* v. *Fey*, 70 Mich. 644 (38 N. W. 656); *Sterling* v. *City of Detroit*, 134 Mich. 22 (95 N. W. 986); *Blickley* v. *Luce's Estate*, 148 Mich. 233 (111 N. W. 752). It has, however, followed the rule with reference to violations of statutes, and it has been many times held that a violation of a statute was negligence *per se*. *Billings* v. *Breinig*, 45 Mich. 65 (7 N. W. 722); *Syneszewski* v. *Schmidt*, 153 Mich. 438 (116 N. W. 1107); *Little* v. *Bousfield & Co.*, 154 Mich. 369 (117 N. W. 903); *Van Doorn* v. *Heap*, 160 Mich. 199 (125 N. W. 11); *Tabinski* v. *Manufacturing Co.*, 168 Mich. 392 (134 N. W. 653).

While in some cases involving the statute the violation has been spoken of as "evidence of negligence," we think there has been no intention to depart from the rule that a violation of a statute imposed under the police power of the State is negligence *per se*. The portion of the charge complained of in this connection having been based on the statutory provisions regulating the operation of automobiles, the trial court was in no error in giving the request.

It is also said that the trial court was in error in giving defendant's fourteenth request, which was as follows:

"When a street car and an automobile are approaching a street intersection, the street car has the right of way, and if it is necessary to avoid an accident, it

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is the duty of the automobile to stop and allow the street car to pass on ahead of it."

Counsel contends that, if this request had been properly qualified, it would not have been objectionable, but, as it stands, it is not the law, for the reason that, if a motorman should discover that the track was about to be occupied by an automobile in making a crossing, it would be his duty to stop, if necessary, to avoid a collision; and it is further claimed that the whole charge is characterized "by emphasizing the duties of the party attempting to cross the tracks, without also explaining the duties of the motorman in connection therewith."

Counsel have evidently overlooked the fact that this request was not given as requested. The trial court inserted the word "ordinarily" after the words "street car," making the charge read, "the street car ordinarily has the right of way," etc. Before giving this request, the trial court gave some rules of law bearing upon the reciprocal duties of the street railway company and other parties using the highways, and, among these observations, the following occur:

"People who are traveling upon the streets of this city have a right to rely to some extent upon the watchfulness and prudence of the motorman in charge of the cars, and upon his ability to stop his car within a reasonable distance, and it would be the duty of the motorman in this case, who represented the defendant, and who was in charge of the car, to be cautious and vigilant, and not to run his car at an unlawful or dangerous rate of speed, and to keep a sharp lookout, and to give reasonable and timely warning of the approach of his car to travelers upon the street, or who were about to cross the tracks ahead of his car, and to check and stop his car when it seemed necessary to do so.

"A traveler upon the streets of this city is not required to refrain from crossing whenever a car is in sight, and there may be cases where he may properly exercise his judgment upon the question of when he

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should attempt to cross the track, and it may happen that he has miscalculated the distance the street car is away from him. The question is: Did he act as an ordinarily prudent man would have acted in attempting to cross?

"If an ordinarily prudent man under the circumstances would have attempted to cross, he is not necessarily guilty of contributory negligence, although he miscalculated the distance.

"The rights to travel the streets of this city as between the street cars and travelers, and at the intersections thereof, are reciprocal, and it is the duty of the motorman to watch and so far as practicable keep his car under control."

In view of the jury having been instructed in this manner, we think the criticism of counsel is not well taken. We have examined the other errors assigned, but find no reversible error in them.

The judgment of the lower court is affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

BADY *v.* DETROIT UNITED RAILWAY.

STREET RAILWAYS—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Where plaintiff, on a dark, stormy night, in crossing a street and defendant's tracks, stopped and looked just before he stepped upon the tracks, but saw no car coming and he was struck by a car which carried no headlight, and which did not sound a bell or signal, there was evidence sufficient to present an issue of fact for the jury whether he was in the exercise of ordinary care.

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Error to Wayne; Murphy, J. Submitted November 13, 1913. (Docket No. 101.) Decided June 1, 1914.

Case by William Bady against the Detroit United Railway for personal injuries. Judgment for defendant on a directed verdict. Plaintiff brings error. Reversed.

Washington I. Robinson, for appellant.

Corliss, Leete & Joslyn and *A. B. Hall,* for appellee.

BIRD, J. This is a personal injury case, in which the trial court at the conclusion of plaintiff's case directed a verdict for the defendant, on the ground that the plaintiff contributed to his own injury. The sole question presented is whether the trial court was in error in so doing.

The testimony discloses that on the night of November 27, 1910, plaintiff was walking south on the west side of McDougall avenue in the city of Detroit. When he reached the intersection of McDougall avenue and Hendricks street, he lowered his umbrella, and went to within a few feet of the north rail of defendant's track on Hendricks street, where he stopped, looked, and listened for an approaching car. Neither seeing nor hearing one, he proceeded on his way, and an instant later was struck by a west-bound car and injured.

It is gathered from the testimony of the plaintiff and his witnesses that the night in question was a dark and stormy one, that the car was being operated at a high rate of speed, without a headlight, and that no warning was given as it approached the intersection of the avenues. It further appeared that there was no street light at the intersection. Under this state of facts, we do not think it should be said, as a matter of law, that plaintiff was not in the exercise of

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ordinary care in attempting to go across the track. That question was one of fact to be determined in view of all the circumstances by the jury. In determining the question, it was proper for the jury to consider to what extent the storm and darkness might have prevented him from discovering the car in season to avoid it, and it was likewise proper for them to consider to what extent the failure to have a headlight in the usual position on the car might have misled him, and also to consider whether his lack of appreciation of the danger he was in was due in any manner to the failure of defendant to do the usual thing and sound the gong as the car approached the intersection.

Notwithstanding the presence of all these conditions, as is urged by defendant, it would seem as though plaintiff ought to have seen or heard the car approaching if he took the precaution which he testified he did before attempting to go upon the track; but whether he did the thing which ordinarily careful and prudent men would do under similar circumstances is a question which is not within our province to decide. *Wavle* v. *Railways Co.*, 170 Mich. 81 (135 N. W. 914). Some light is thrown upon the question by a lady who walked down McDougall avenue for two blocks immediately behind the plaintiff. She testified that, when plaintiff was struck, she was not to exceed three feet away, and up to that time she had neither seen nor heard the approaching car.

The trial court was much influenced in his disposition of the case by the holding in *Hamilton* v. *Railway*, 167 Mich. 5 (132 N. W. 453). In that case plaintiff alighted from a north-bound car, and went around the rear and attempted to cross the south-bound track and was struck by a car. It was dark, and the claim was made that no headlight was exhibited. The question as to whether there was a headlight was submitted to the jury, and they found against the plaintiff, and the case was subsequently affirmed by this

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court. We do not think that case is controlling because of the difference in conditions.

The judgment of the trial court is reversed, and a new trial granted.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, and STEERE, JJ., concurred. MOORE, J., did not sit.

HATT v. GREEN.

1. WILLS—LEGACIES—GRANDCHILDREN.
   Under a will bequeathing to the daughter of testator a stated sum and giving to her children, mentioned by name, the sum of one thousand dollars, a son of the daughter born after the will was executed received no share of the property and took nothing by the will.

2. SAME—JUDGMENT—CONCLUSIVENESS.
   Where the grandson was a party to proceedings in which the will was construed and he took no appeal, the decree was binding on him in another suit in which his rights under the will were involved.

3. SAME—TRUSTEES—GOOD FAITH—ACCOUNTING.
   The will having conveyed certain land or its value to decedent's grandchildren at their majority, and the evidence showing that the trustees of his estate paid the eldest his proportionate share when he became of age, they should be held to have elected to keep the lands and treat the appraised value of the realty as a fixed trust fund in their hands to be invested and accounted for to the beneficiaries.

4. SAME—TRUSTS—INFANTS—ELECTION OF RIGHT OR REMEDY.
   By dealing with the minors interested in the estate about as the trustees saw fit, stating that a certain sum rep-

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resented their several shares in the estate and demanding a formal release on payment of that amount, from the infant beneficiaries as they became of age, the trustees must be construed as having elected to retain the real property described in decedent's will at its appraised value subject to the interest of the other devisees and legatees.

5. LIMITATION OF ACTIONS—TRUSTS—EXPRESS TRUSTS.

The bar of the statute of limitations does not operate between trustee and *cestui que trust* of an express trust, and no length of time is a bar to an accounting. Time does not run until a repudiation or adverse possession by the trustee with notice on the part of the beneficiary.

Appeal from Bay; Collins, J. Submitted January 7, 1914. (Docket No. 2.) Decided June 1, 1914.

Bill by Milo Hatt and others against William Green and others for an accounting and other relief. From a decree for defendants, complainants appeal. Reversed.

Weadock & Duffy and *E. S. Clark,* for complainants.

Roy E. Brownell (John E. Kinnane, of counsel), for defendant William Green.

One George Green, grandfather of the complainants and father of defendant William Green, died January 1, 1899, leaving a last will and testament, the material provisions of which follow:

"*First:* I will and bequeath to my daughter, Mary Ann Hatt, five thousand dollars to be paid to her out of my personal estate by my executors at any reasonable time after my decease, and to her children I will and bequeath one thousand dollars out of my personal estate and four lots of land of eighty acres each lot, more or less, as laid out by government survey, situate and laying in the township of Monitor, Bay county, Michigan, or the value of said lands, the value to be taken at or as soon after her oldest living child becomes of the age of twenty-one years, said value in

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aggregate and said money, viz.: One thousand dollars making a total aggregate value of land and money to be divided equally according to the number of her children then living giving to each as they attain their majority their share with the accruing interest, *i. e.*, to George H. Hatt (Mary Ann Hatt, my daughter's oldest child) to Ellen J. Hatt, to Milo Hatt, to Merwin Hatt, to Walter Hatt, to Alfred Hatt, to Sarah A. Hatt, to Wade E. Hatt and to Governor Hatt, the youngest now of her children, each to receive dollar for dollar of said aggregate value of money and lands, and should any of her children die subsequent to the real or appraised value of said lots of land in section number nine in the township of Monitor aforesaid, such deceased child's share to be divided equally these already of age.

* * * * * * *

"*Fifth:* I give and bequeath to my sons, William and James all the rest and residue of my real estate, title deeds of which have been given, viz.: To William Green the west half of the northwest quarter of section number twenty-five and the south half of the southwest quarter of section number twenty-four, north range five east in the county of Livingston and State of Michigan, and to my son, James Green, the southeast quarter of section number twenty-six township four north range five east in the county of Livingston and State of Michigan except two acres on the southeast corner.

"*Sixth:* I also give and bequeath to my sons, William and James, all the rest of my property, personal, including notes, interest in and belonging to all mortgages of real estate and chattels and revenues belonging appertaining to the same, after paying the several legacies herein aforesaid, and in the manner stated from the personal hereby bequeathed to them and I do hereby nominate and appoint the said William Green and James Green, my two sons to be the executors of this my last will and testament."

Shortly after the death of George Green, his sons, as executors, secured a judicial construction of the first section of said will. The important part of the decree follows:

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"And it further appearing to this court that the said George Green in his lifetime, and after the execution of his said will, made, executed, and delivered to Ellen J. Hart (before her marriage Ellen J. Hatt) one of the grandchildren of the said George Green, mentioned in said will, a warranty deed, wherein and whereby he conveyed to said Ellen J. Hart in fee a portion of said last-named four lots of land, to wit, the E. ½ of the W. ½ of the N. E. ¼ of section No. 9, in the township of Monitor, Bay county, Mich., and that the purpose and intention of the said George Green in so conveying said land to Ellen J. Hart was to satisfy the provision of his said will so far as the same concerned and benefited the said Ellen J. Hart.

* * * * * * *

"It is further ordered, adjudged, and decreed that the said defendant Rollo Hatt, having been born after the making of his said will by the said George Green, deceased, and not being specifically mentioned in said will, is not one of the devisees or legatees therein, and is not entitled to any of the estate of the said George Green, deceased.

"It is further ordered, adjudged, and decreed that the defendants George Hatt, Ellen J. Hart, Milo Hatt, Merwin Hatt, Walter Hatt, Alfred Hatt, Sarah A. Hatt, Wade E. Hatt, and Governor Hatt, children of Mary Ann Hatt and grandchildren of the said George Green, are, by the terms of said will, entitled to the sum of $1,000 in the aggregate from the personal property of said George Green, deceased, the same to be equally divided between them, share and share alike, payment to such of said defendants as are now of age to be made immediately, and the balance of said shares to be paid, by said executors to each of said defendants entitled thereto, on his or her attaining the age of 21 years, together with all accrued interest thereon from the investment of said shares at interest by said executors, which investment the said executors are required to make; all interest obtained thereby by said executors on said shares after the date of this decree to belong to and to be paid to said defendants, respectively, with the principal as aforesaid, on their becoming 21 years of age. Provided, however, in case any of said children should die before reaching the age of 21 years subsequent to the ap-

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praisal of the land hereinafter mentioned, the share belonging to said child both principal and interest to belong and be immediately paid over to such of the said children as shall then have attained the age of 21 years, share and share alike. It is further ordered, adjudged, and decreed that the first section of the will of said George Green, wherein he wills and bequeaths to the children of his daughter Mary Ann Hatt four lots of land of 80 acres, each lot more or less as laid out by government survey situate and lying in the township of Monitor, Bay county, Mich., or the value thereof, refers to and disposes of the W. ½ of the N. E. ¼; the W. ½ of the S. E. ¼; the E. ½ of the N. W. ¼, and the E. ½ of the S. W. ¼, all of section No. 9 in township No. 14 north of range No. 4 east, containing 320 acres of land according to the United States survey, and to no other land whatever; that by the warranty deed executed on the 23d day of June, A. D. 1888, by George Green to Ellen J. Hart (before her marriage Ellen J. Hatt) one of said defendants conveying the E. ½ of the W. ½ of the N. E. ¼ of said section No. 9, containing 40 acres of land, more or less, the said George Green, deceased, satisfied the provisions of his said will as to said lands, so far as it concerns the said Ellen J. Hart, and that the said Ellen J. Hart has no interest in any real estate of the said George Green, nor in the value of any such real estate other than that conveyed to her by said deed aforesaid in his lifetime; that it was the intention of the said George Green in and by his said will, and the section thereof under consideration, to set the balance of said four lots of land herein above described apart, and the same is hereby set apart as and for a fund for the benefit of the other children of said Mary Ann Hatt, to wit, George H. Hatt, Milo Hatt, Merwin Hatt, Walter Hatt, Alfred Hatt, Sarah A. Hatt, Wade E. Hatt, and Governor Hatt; that in and by the terms of said will the title to said land, to wit, the W. ½ of the W. ½ of the N. E. ¼, the W. ½ of the S. E. ¼, the E. ½ of the N. E. ¼, and the E. ½ of the S. W. ¼ of section No. 9 in the said township of Monitor aforesaid vested in the executors of the will of the said George Green, *in fee in trust, however*, for the purposes of said will and the benefit of the last aforesaid named children of the said Mary

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Ann Hatt, as follows: That the said executors should cause the said lands last above described to be appraised at their true value as soon as convenient after the oldest child of the said Mary Ann Hatt should reach the age of 21 years, and that as soon as the said children of the said Mary Ann Hatt, to wit, George Hatt, Milo Hatt, Merwin Hatt, Walter Hatt, Alfred Hatt, Sarah A. Hatt, Wade E. Hatt, and Governor Hatt, should respectively attain the age of 21 years the said executors should deliver over and convey to each of said children, respectively, his or her *pro rata* one-eighth part thereof according to value, or that, instead of so delivering over and conveying to said children, respectively, each his or her *pro rata* part of the land itself, the said executors might and may at their option sell and convey said lands in fee to some other party or parties, and out of the proceeds to pay to each of said children, respectively, when he or she should arrive at the age of 21 years, the one-eighth part of the value of said lands as appraised *with such interest as shall accrue* thereon by being properly loaned (which the said executors are required to cause to be done in case they should deed or sell the land instead of delivering it over or conveying the land itself). In case, however, any of said children should die subsequent to the said appraisal of said land as aforesaid, and before reaching the age of 21 years, the share so going to such child, together with accrued interest thereon, in case the share shall have been sold, to be paid to and equally divided among such of said children as shall then have reached the age of 21 years, such appraisement of said lands to be made under the direction of the probate court for the said county of Livingston. It is further ordered, adjudged, and decreed that the first clause of the will mentioned and set forth in the bill of complaint in this cause is hereby construed by this court in the manner and to the effect hereinbefore set out in this decree."

In accordance with the mandate of said decree, defendant William Green and his coexecutor caused an appraisal of said lands to be made on June 3, 1891, as follows:

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	Appraised Value. Dollars.	Cents.
The west half of the west half of the northeast quarter, sec. 9, 40 acres	$ 600	00
The west half of the southeast quarter, sec. 9, 80	1,200	00
The east half of the northwest quarter, sec. 9, 80	1,200	00
The east half of the southwest quarter, sec, 9, 80	800	00
	$3,800	00

Following this the executors settled with each of the children of Mary Ann Hatt at or near the time they severally became of age. Touching the complainants the settlements were made as follows:

	Born.	Reached Majority.	Date of Settlement.
Milo Hatt..	Mar. 26, 1870.	Mar. 26, 1891.	May, 1891.
Alfred Hatt.	Apr. 2, 1877.	Apr. 2, 1898.	May 14, 1898.
Wade Hatt..	Jan. 24, 1881.	Jan. 24, 1902.	Feb. 26, 1902.
Rollo Hatt..	Nov. 1, 1885.	Nov. 1, 1906.	Had no interest.

In each case the executors took from the beneficiary a receipt and release in the following terms:

"Received of Wm. Green and Jas. Green, executors of the last will and testament of George Green, deceased, four hundred seventy-five dollars, it being my one-eighth of the appraised value of the west half of the west half of the northeast quarter, the west half of the southeast quarter, the east half of the northeast quarter, and the east half of the southwest quarter of section number nine in the township of Monitor, Bay county, Michigan, and this receipt is intended by me to release the said Wm. Green and Jas. Green, as such executors from all and any further liability to me in consequence of and for my interest in said above described lands and in the proceeds from the sale of said lands under the will of George Green, deceased, and under the decree of the circuit court for the county of Livingston, in chancery, in the matter of interpreting the provisions of said last will and testament and do hereby receive the above-named sum of money

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as payment in full for all my interest in the said estate of said George Green, deceased, under the terms of the said will and the said decree and otherwise.

"Dated this 12 day of March, A. D. 1904.

"Governor D. Hatt.

"Signed, sealed and delivered in the presence of L. H. Berry. L. W. Edwards.

"Dated the 12 day of March, A. D. 1904.

"Received of Wm. Green and Jas. Green, executors of the last will and testament of George Green, deceased, one hundred dollars, it being my portion of the money left the children of Mary Ann Hatt, mentioned in said will.

"Governor D. Hatt.

"Signed, sealed and delivered in the presence of L. H. Berry. L. W. Edwards."

On March 7, 1893, William Green and James Green sold the W. ½ of the N. W. ¼ of section 9 for the sum of $1,800. The title to the balance of the land remains as it was fixed by the will. Complainants pray for an accounting against William Green and for his removal as trustee. The other defendants appear to have no beneficial interest in the litigation. A decree having been entered dismissing the bill, complainants appeal.

BROOKE, J. *(after stating the facts).* It must be held that complainant Rollo Hatt took nothing under the will of his grandfather. His mother's children were described by name in the will before his birth, and he was a grandson, not a son, of the testator. Moreover, he was a party to the proceeding in which the will was construed and his rights determined. No appeal was taken from that decree, and it stands as the law of the case.

We are satisfied that the appraisal of 1891 was fair. It was made by a supervisor and an ex-supervisor of the township, and it remained on file in the probate court unquestioned by complainants for upwards of 20 years. In the meantime the executors paid the taxes upon the land and it was drained. It undoubt-

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edly increased in value, particularly within the past 10 years. We are unable to discover any fraud or gross undervaluation in the appraisal. Assuming that defendant William Green and his coexecutor had the right to elect to keep the land and pay its appraisal value to the children of Mary Ann Hatt, a conclusion perhaps warranted by the terms of the decree construing the will and the opinion upon which the decree was based, have they discharged their obligations to complainants? It is obvious that it was the intention of the testator to create a fund (either land or money) for the benefit of complainants and their brothers and sisters.

The fact that the will commanded an appraisal and distribution of the fund from time to time *with interest* imposed the duty upon the executors and trustees of turning over the land with its unearned increment to the beneficiaries from time to time as they became of age, or of investing the fund represented by the appraisal valuation for the benefit of the beneficiaries, so that when each reached his majority, he should receive his share, plus the interest earned thereon during his minority. Neither course was followed by the trustees.

We are satisfied that when the eldest child became of age and the trustees paid to him his proportionate share of the appraisal value of the lands, they should be held to have made an election to keep the lands and to treat the appraised valuation as fixing the amount of a trust fund in their hands which, both under the will and the decree, they were bound to keep invested for the benefit of their *cestuis que trustent.* A careful reading of the record convinces us that the trustees dealt with the complainants about as they pleased. They told each one that the sum of $475 represented his share of the estate to which he was entitled, and demanded and secured a formal release.

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The several transactions occurred when each of the complainants was barely 21 years of age, country boys, and presumptively ignorant of their legal rights.

The learned circuit judge held that any claim which complainants might have was barred by the statute of limitations. In this case we think he was in error.

In 2 Perry on Trusts and Trustees (6th Ed.), § 863, it is said:

"As between trustee and *cestui que trust*, in the case of an express trust, the statute of limitations has no application, and no length of time is a bar. Against an express and continuing trust time does not run until repudiation or adverse possession by the trustee and knowledge thereof on the part of the *cestui*."

See, also, *Jones* v. *Home Savings Bank*, 118 Mich. 155 (76 N. W. 322, 74 Am. St. Rep. 377); *Murphy* v. *Cady*, 145 Mich. 33 (108 N. W. 493), and *Russell* v. *Huntington Nat. Bank*, 162 Fed. 868, 89 C. C. A. 558.

The decree of the court below is reversed, and a decree will be entered in this court confirming the title to the lands in question in defendant William Green and the heirs of his cotrustee, but providing for an accounting against said defendant William Green in which he shall be charged with interest upon each share paid complainants from the time settlement was made with the oldest child, at which time the trustees must be held to have made their election. Complainants will recover costs of both courts.

MCALVAY, C. J., and KUHN, STONE OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

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MERLAU *v.* KALAMAZOO CIRCUIT JUDGE.

1. FRAUD—MISREPRESENTATION—VALUE—EXCHANGE.
   In an action for deceit and false representations whereby plaintiff was induced to exchange her property for a farm, representations that defendant's farm was worth $4,000, that he had purchased it for that amount, that he had sold the property on a land contract for $4,000, receiving a payment of $1,500, that the buildings were good and the soil productive and the farm was occupied by a family which were cultivating it, being false, sufficiently sustained plaintiff's claim of fraud, and entitled plaintiff to a writ of *capias ad respondendum*.

2. SAME—CONSIDERATION—CONTRACTS.
   Nor was the defendant relieved of the consequences of his wrongful act because no default had occurred upon the land contract before plaintiff commenced her action; affidavits establishing that the contract called for nearly three times the actual value of the land tended to show that the plaintiff had been defrauded in the exchange.

3. SAME—RESCISSION—FALSE REPRESENTATIONS.
   No rescission or restitution is necessary as a condition precedent to an action for damages for fraud and deceit.

Mandamus by Nellie Merlau against Nathaniel H. Stewart, Kalamazoo circuit judge, to compel respondent to vacate an order quashing a writ of capias. Submitted January 20, 1914. (Calendar No. 25,943.) Writ granted June 1, 1914.

Lincoln H. Titus, for relator.

Jackson & Fitzgerald, for respondent.

MCALVAY, C. J. Relator asks for a writ of mandamus to be issued against respondent to compel him to set aside a certain order made by him as such circuit judge in a cause pending in said court, wherein relator is plaintiff and Fred A. Herreman is defend-

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ant, quashing the proceedings had upon a certain writ of *capias ad respondendum*, discharging defendant from bail and his sureties upon the bail bond.

This action by relator is brought against defendant to recover damages arising from fraud. The answer of respondent and the brief of his counsel in these mandamus proceedings admit that the statement of facts in relator's brief is substantially correct. The charges of fraudulent misrepresentations made by defendant to relator in connection with the transactions hereinafter detailed are not contradicted. Counsel for respondent contend that the truth or falsity of such representations is absolutely immaterial. Under these circumstances, it will be necessary to state only such facts as may be required to show the fraudulent statements, to properly understand the questions involved, as follows: From the affidavits presented upon the application for the writ, and upon which it was allowed, it appears that relator was the owner of a house and lot in the city of Kalamazoo, of the value of $2,500; defendant claimed to own and, as the records in the office of the register of deeds also show, did own, a farm of 80 acres in Portage township, Kalamazoo county. A short time before May 13, 1913, he came to relator, whose property he had theretofore examined, and negotiations began between them as to an exchange of these properties. She charges that he fraudulently and falsely represented to her he had just purchased this farm and paid for it the sum of $4,000; that the property was well worth that amount; that there were situate upon said premises a good house, barn, and other outbuildings; that the soil was good and productive; that there was a man, or family, living upon said farm and working it—all of which representations as to the value of said farm, the amount he paid for it, the quality of the land, that it was being occupied and cultivated, were false and fraudulent. During these negotiations he further

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stated to her that he had recently sold this farm on a contract for $4,000, upon which he had received $1,500, and that there was upon it a mortgage given to the original owner for the purchase price, for the sum of $600. Defendant then and there offered relator to deed to her said farm, subject to the mortgage of $600, to assign to her the said land contract, and to pay her $200 in cash, in exchange for her Kalamazoo property.

Relator believed such statements, and, relying implicitly and fully upon such false and fraudulent statements and representations so made by defendant to her, did not go to the said premises or make any inquiry or investigation concerning them, or the value and condition of the same, then and there accepted his offer to exchange properties, being induced to do so by such false and fraudulent representations, which she believed to be true, and on May 13, 1913, she executed and delivered to him a warranty deed of her premises, and on the same date, his wife joining him, defendant executed and delivered to her a warranty deed of this farm, subject to a mortgage of $600, and also subject to the land contract of $4,000, less $1,500 paid thereon, assigned the said land contract to her, and paid her $200. She states that had she known the true condition of the farm, and that the statements and representations of defendant were false and fraudulent, she would not have made the exchange of properties with defendant, received what he deeded to her, or deeded her property to him.

In support of her affidavit, made upon her own knowledge, the substance of which has been given, relator, upon her application for a writ of capias, to show the falsity of defendant's statements to her, presented the affidavit of the original owner of the farm, showing that he sold it to defendant for the sum of $1,000, and no more, of which $400 was paid in cash, and the balance secured by mortgage on the farm for

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$600. Also the affidavits of Mr. Titus and Mr. Miller, which show that there were no good buildings upon this land; that the soil was poor and run out; that the farm was largely marsh land; that there was nobody working the land; and that the same had not been occupied and cultivated for seven years previous thereto. Upon this showing a writ of *capias ad respondendum* was issued, and an order was indorsed thereon by respondent that defendant be held to bail in the sum of $1,000. Defendant was arrested upon such writ and gave bail to the officer in the sum required. Later defendant made a motion to quash the proceedings under such writ and to be discharged from such bail and for the discharge of his sureties. This motion was granted upon a hearing, and respondent ordered "that all proceedings had on said affidavit are hereby quashed, the above-named defendant discharged from bail, and said bail bond held for naught and the sureties thereon discharged." The writ of mandamus in these proceedings is sought to compel respondent to vacate and set aside this order.

The record presents but one question to be determined, and that is whether the showing made by the affidavit of relator, and the affidavits annexed to and made a part of it, stated a cause of action and entitled her to this writ of capias. Respondent determined the matter upon the sole ground that there had been no forfeiture of this contract, and relator had not been damnified. The truth of the statements contained in relator's showing made upon the application for the writ are not questioned in these proceedings. Is a cause of action for fraud stated?

By these false and fraudulent statements made by defendant to relator that he had paid $4,000 for the land he desired to exchange for her property, and that his land was worth it, that there were on said premises a good house, barn, and other outbuildings, that the soil was good and productive, that there was a

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man or family living upon the farm and working it, upon the truth of which statements she absolutely relied, she, without viewing the premises and without inquiry, was induced to and did deed her Kalamazoo property to him. She swears that, by means of these false and fraudulent statements, she has been damaged and defrauded. Relator, by her affidavit and the supporting affidavits, has stated a good cause of action for fraud. *Pratt* v. *Allegan Circuit Judge*, 177 Mich. 558 (143 N. W. 890).

Attorneys for respondent contend that relator received, as a consideration for her premises, the land contract for $4,000, upon which $1,500 had been paid, and $200 in cash, and the argument is made that this was a valuable consideration upon the face of the papers, and, no default having been made in the payments on this contract, she has not been damaged or defrauded and has no right of action against defendant. There is no force in this contention, as far as these proceedings are concerned. It might possibly be material upon the trial of the case as bearing upon the measure of damages.

In view of the proof presented, showing the true condition and actual value of the premises for which defendant by fraud induced relator to exchange her property, this contract to sell these premises for nearly three times the actual value might well be considered as tending to support relator's contention that she had been defrauded. It was not necessary that default should occur in this contract as a condition precedent to bringing suit for fraud.

It is intimated by counsel that relator has not rescinded the contract and offered to restore what she received. Upon this proposition it need only be said that it is well-settled law that no rescission or restitution is necessary as a condition precedent to maintaining an action for damages arising from false representations and deceit. 20 Cyc. p. 91, and cases

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cited; *Wegner* v. *Herkimer*, 167 Mich. 587 (133 N. W. 623). The fraud in this case was completed when defendant, by his false representations, induced relator to deed her property to him, and a right of action then accrued. Petitioner had been fraudulently induced by defendant to part with her property. *Briggs* v. *Brushaber*, 43 Mich. 330 (5 N. W. 383, 38 Am. Rep. 187). The value and condition of this farm was falsely represented by defendant. Relator having parted with her property, relying upon such representation, a right of action accrued immediately upon ascertaining its falsity. *Short* v. *Cure*, 100 Mich. 418 (59 N. W. 173); *First Nat. Bank of Ovid* v. *Steel*, 146 Mich. 308 (109 N. W. 423). None of these authorities are disputed, and counsel for respondent cite no authorities supporting their contentions. The motion to quash the proceedings should have been denied.

A peremptory writ of mandamus will issue against respondent to compel him forthwith to set aside the order made and entered by him quashing the proceedings and discharging defendant from bail in the cause pending in the circuit court, Kalamazoo county, wherein relator is plaintiff and Fred Herreman is defendant, and to proceed in due course to hear said cause upon its merits. Relator will recover costs of these proceedings against Fred A. Herreman.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

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RUSCYK v. DETROIT UNITED RAILWAY.

1. AMENDMENT—ADJOURNMENT—CONTINUANCE—SURPRISE.
   On the trial of a personal injury action in which the plaintiff amended his declaration so as to charge defendant's motorman with subsequent negligence and failure to take necessary precautions to avoid a collision with the car on the rear bumpers of which plaintiff was riding, the court should not have permitted the amendment without granting a continuance which defendant's attorney asked for on the ground of surprise.

2. STREET RAILWAYS—PERSONAL INJURIES—NEGLIGENCE.
   Held, also, that the evidence did not sustain plaintiff's claim that defendant's motorman was chargeable with actionable negligence notwithstanding plaintiff's precedent contributory negligence, that defendant's motorman took every possible precaution to avoid the collision after he discovered plaintiff's peril and a verdict for the defendant should have been directed.
   KUHN and BIRD, JJ., dissenting.

Error to Wayne; Van Zile, J. Submitted November 6, 1913. (Docket No. 83.) Decided June 1, 1914.

Case by Bernard Ruscyk, by his next friend, against the Detroit United Railway for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed.

Corliss, Leete & Moody (William G. Fitzpatrick, of counsel), for appellant.

Dohany & Dohany, for appellee.

MCALVAY, C. J. A judgment was recovered by plaintiff against defendant for damages in a negligence case for personal injuries. Plaintiff, a young man about 17 years old, received his injury at about half past 6 o'clock on the morning of April 19, 1911,

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while riding on the rear bumper, or deadhead, outside of the rear dash of a north-bound Baker-Chene street car of defendant in the city of Detroit, while such car was on the passing switch near the corner of Garfield and Chene streets.

At this time defendant operated a single track line on Chene street from Gratiot avenue to the northeasterly city limits, upon which cars moved north and south, passing each other on switches located at distances of from 800 to 900 feet apart. The service ordinance then in force called for a three-minute service, upon which cars from the barn on Baker street were operated. From the Chene street intersection on this track it was not possible to operate cars exactly on schedule. The cars from that point were run north and south substantially upon a double header system by which two cars going north would ordinarily pass two cars going south on the same switch.

On the morning in question it had rained considerably before the accident occurred. The track was wet, and the weather foggy. This was during what is called the "rush hour," and all the cars were crowded. Plaintiff lived several blocks north of this switch. He was acquainted with the conditions of traffic at this time of day, and walked south on Chene street as far as Forest, where, discovering a car on or near the switch at Garfield street, one block further on, he proceeded south. Arriving at this place he found the car crowded inside and on the platform. The second car, bound in the same direction, also came on this switch and stopped near the rear of the first car. Plaintiff says he undertook to get on this second car, and, not being able to do so, because of the crowd, went back to the first car, and, with others, climbed on the rear bumpers of the rear dash, where he stood when the conductor took his fare. The testimony indicates that the cars stood from 6 to 15 feet

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apart. These cars waited on this switch until two south-bound cars passed them. The first car then started forward and, after moving a short distance, suddenly stopped.

To this point there is no dispute between these parties upon the facts. It is claimed on the part of plaintiff, and testimony is in the record on his part tending to show, that the motorman on the rear car, who was in a position to see plaintiff riding on the bumper of the first, slowly started his car forward, and did not stop it until the collision occurred and plaintiff was injured.

It is not disputed on the part of defendant but that the motorman operating the rear car saw the persons who were riding on the bumper. Defendant's claim relative to the collision, tending to support which there is evidence in the record, is as follows: The motorman on the second car testified that, observing the first car had started, he gave the signal that he was ready, and, receiving the answer from his conductor, started his car ahead on one point of the controller, afterwards increasing it to two. He says he very soon observed that the car ahead had stopped, and at once shut off his power, tripped his sand, put on his air brakes, and hand brakes, but, owing to the wet and slippery condition of the track, was unable to stop his car before it struck the bumper of the first car a slight blow, without injury to either car. There is no dispute between the parties as to the following facts: Some of the men standing on this bumper jumped before the cars collided. Plaintiff's left foot was caught between the bumpers of the cars and badly crushed, and another boy was injured slightly. These bumpers are five inches wide, extending out this distance around the end of the car. Plaintiff distinctly saw the car approaching slowly from the rear, and testified he thought it was going to stop. He had fre-

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quently used the cars on this line before this day in going to and from his work. He appears, from his testimony, to be a young man of ordinary intelligence, and had attended a Polish school, also an English school into the fifth grade, and could read and write both languages.

Experienced motormen operated both of these cars on this date. The first car started out after the two south-bound cars had passed on this switch. It had gone but a short distance before the motorman discovered another south-bound car approaching about one block south of the next switch. He had not discovered it sooner because of the fog. To avoid being forced to back south if he passed the frog on this Garfield switch going north, and thereby lose his place and also time, he stopped his car at once.

Cars, of necessity, on this line, because many of the switches will accommodate but two cars, must keep quite near together. The motorman of the rear car could not see, as he testifies, the car going south, and, having started slowly, when he discovered the sudden stopping of the first car, immediately made the efforts to stop his car, the controlling mechanism of which was in perfect condition.

At the close of plaintiff's case, and after a motion made by defendant for a directed verdict, because there was no proof of the acts of negligence charged in the first count of the declaration, because of a fatal variance between the allegations of negligence contained in the second count of the declaration and the proofs in the case, because there was no evidence of negligence proved as charged in such count, and because plaintiff was guilty of contributory negligence, the court, upon motion of plaintiff's attorney, granted leave to amend the second count of the declaration. This was done, notwithstanding the objection of defendant that such amendment charged a new cause of action, on account of which defendant was not pre-

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pared to proceed because of complete surprise. The amended count reads as follows:

"That he boarded a certain car of the defendant which was facing in a northerly direction, and which was standing on the easterly side of the switch at said point, and paid his fare to the conductor in charge of said car; that said car was greatly overcrowded; plaintiff took a position outside of the rear dash of the same, in which position plaintiff and several other passengers were standing when the conductor of said car accepted his fare; that after plaintiff boarded said car said car was moved forward on said switch a distance of 4 or 5 feet, at which point it stopped and remained stationary for a period of three or four minutes; while said car was so standing at said point on said switch, the defendant, by its servants in charge of another car standing about 11 feet in the rear of said car upon which plaintiff was a passenger, caused said rear car to be started forward and to be operated to and against the plaintiff who was standing on the bumper; * * * that the motorman in charge of said car in the rear of the car saw plaintiff and several other passengers in their position outside of the rear dash of said car before causing said rear car to be started forward, and well knew that if he collided with the rear of said car upon which plaintiff was riding, that plaintiff would be crushed and crippled, that notwithstanding the fact that plaintiff occupied said position outside of the rear dash of said car and was in plain view of, and had been seen by defendant's motorman before starting his car forward, the said motorman in charge of said rear car, in utter disregard of his duty in the premises, and with reckless, thoughtless, and intentional disregard of the consequences, acting with gross, wanton, and wilful negligence, caused said car which he was operating to be propelled forward to and against the plaintiff and other passengers who were outside of the rear dash of said car, and without the exercise of any proper effort to avoid said collision."

Defendant was required to proceed at once with the trial upon such declaration as amended, to which its counsel objected and excepted. This declaration

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upon which the case was submitted to the jury was the third which had been filed in the case.

The original declaration, filed August 15, 1911, contained but one count, and alleged that, while plaintiff was a passenger on the rear platform of a crowded car of defendant company which had arrived on the switch at Garfield street, another car going in the same direction at a high rate of speed collided with it, badly crushing and injuring him, charging defendant's duty was to operate its cars not less than a certain distance apart and at a certain speed, which duties were alleged to have been violated.

In October, 1912, upon leave given, plaintiff filed an amended declaration containing two counts. The first count alleged that he boarded one of defendant's cars at Garfield and Chene streets to go to his work, and paid his fare; it charges in proper language defendant's duty to operate its cars without negligence, and as required by certain ordinances, and at a certain distance apart when approaching from the rear, and at a certain rate of speed; it charges a negligent disregard of such duties in operating a car at a high rate of speed approaching the car upon which plaintiff was a passenger from the rear, so that it collided with it, and he was severely injured, without fault or negligence on his part. The position which plaintiff occupied upon the car is not stated in this count.

The second count alleged that plaintiff at this place, at the invitation of defendant, boarded a greatly overcrowded car while it was standing on Garfield switch; that he "took a position outside of the rear dash of the same" where several others were standing, and paid the conductor his fare; that the car remained stationary for three or four minutes, and, while so standing on the switch, another car of defendant, approaching from the rear of the car upon which plaintiff was a passenger, in plain sight of the approach-

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ing car, where he could be seen for several blocks by its motorman, was operated with gross, wanton, and wilful negligence at a high rate of speed, causing it to collide with the car upon which he was a passenger and injured him severely.

Under the direction of the court, the trial of the case proceeded after the court had denied defendant's motion for a directed verdict, and had allowed an amendment to plaintiff's declaration, notwithstanding an objection by defendant that such amendment stated a new cause of action and was a matter of surprise. The case was tried and submitted upon this declaration amended at the close of plaintiff's case. The result of the trial was a verdict in favor of plaintiff. Defendant has brought the case to this court for review by writ of error.

The errors assigned and relied upon by defendant for a reversal, which are based upon the refusal of the court to grant its motion for a directed verdict at the close of plaintiff's case, do not require consideration. It is admitted in plaintiff's brief that the first count of the declaration was eliminated from the case during the trial. The abandonment of the second count immediately after this motion was made, by asking from the court and accepting permission to amend the second count of plaintiff's declaration and filing the amended count, was an admission on the part of plaintiff that the contention of defendant that there was a fatal variance between the declaration as it then stood and the proofs of plaintiff in the case was well founded.

The contention of defendant that the record disclosed plaintiff was guilty of contributory negligence does not appear to be disputed. This is admitted by the amendment to plaintiff's declaration, which relies entirely for a recovery upon the alleged subsequent negligence of defendant, upon which, if shown, a recovery could be had, notwithstanding plaintiff's con-

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tributory negligence. This was the view of the case taken by the court, as appears from what was said at the time the amendment was made, and later in submitting the case to the jury upon the one question of subsequent negligence.

It is strongly urged on the part of defendant that the court erred in allowing plaintiff to amend his declaration at that time. Under the circumstances, we do not think it necessary to consider the proposition. If it be admitted that allowing such amendment was a matter of discretion on the part of the court, the question remains whether requiring defendant to proceed to trial at once was an abuse of judicial discretion, when its counsel was protesting that this amended declaration stated another and different charge of negligence, whereby defendant, by reason of surprise, was not prepared to proceed to trial.

The court, later in the case, where a similar question arose relative to another amendment to the declaration to allow proof of a certain custom, not so important as the one under consideration, recognized the fact that, if by an amendment a great surprise is given to the opposite party, sufficient time for preparation should be granted, and so ruled. We do not think, under the circumstances of this case, this court should say that, where defendant had been called to meet a certain specific charge of negligence alleged in the declaration, and had prepared to defend such a case, it should be required forthwith to proceed to defend a substantially different charge of negligence, without opportunity to procure witnesses or make other preparation for defense.

At the close of the case counsel for defendant made a motion for a directed verdict, "upon the ground that there is no proof of the allegations of negligence contained in the plaintiff's declaration and that, under the law, the plaintiff is guilty of contributory negligence." Counsel challenged the sufficiency of the

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amended declaration, as not charging a case of subsequent negligence, and said:

"If it does state a case for liability for subsequent negligence, I assert that there is no evidence which supports the allegation of subsequent negligence, as charged in the declaration."

The motion was denied, the court saying:

"I think negligence arises from the fact that the motorman saw it who was operating the car. I think that is sufficient negligence. * * * I think, in other words, you may go to the jury in this case upon the question of subsequent negligence."

Errors are assigned upon the ruling of the court denying this last motion, and also upon the holding of the court that subsequent negligence arose from the fact that the motorman operated the car in such a way that it collided with the car upon which plaintiff was riding, with the knowledge of the fact that plaintiff was in an exposed and dangerous position.

The case was submitted to the jury upon the one question of subsequent negligence upon the theory of the court as above stated. The declaration contains no specific averment of negligence in starting the rear car in the manner it was started, nor as to the speed at which it was operated. There is no dispute in the record but that the car started and proceeded slowly, nor is there any dispute but that the motorman did everything possible to stop the car and avoid collision. Plaintiff testified that it was coming slowly, and that he expected it would stop before striking his car.

To hold the defendant liable for subsequent negligence under this declaration it must appear that after the rear car was started the motorman, with knowledge of the situation, made no reasonable effort to stop it and avoid collision. In other words, that the conduct of the motorman amounted to gross negligence. The evidence in the record does not support such a conclusion.

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Other errors assigned do not require consideration.

For the reasons stated, the judgment of the circuit court is reversed, and a new trial granted.

BROOKE, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred with MCALVAY, C. J.

KUHN, J. *(dissenting)*. I am of the opinion that the judgment should be affirmed, as the question of the defendant's subsequent negligence, under the facts in this case, was a question of fact, and was properly submitted to the jury.

BIRD, J., concurred with KUHN, J.

BLAKESLEE *v.* PEABODY.

1. BROKERS—CONTRACTS—COMPENSATION—PERFORMANCE.
   Where plaintiff, acting as broker for the defendant, secured a buyer for the property who was ready and able to pay the price, and, at the time the transaction should have been concluded, the defendant was in Europe and the buyer, through defendant's agent, obtained possession of the premises, which he occupied for some time, afterwards conveying the property to defendant by quitclaim deed, the plaintiff had performed his commission so as to be entitled to the agreed compensation.

2. SAME—RATIFICATION—VENDOR AND PURCHASER.
   Under conflicting testimony, the issue whether defendant ratified the sale by negotiating with the purchaser and obtaining a quitclaim deed of the premises during the absence of defendant from the country, was a question of fact, properly left to the jury.

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Error to Ottawa; Cross, J. Submitted January 23, 1914. (Docket No. 85.) Decided June 1, 1914.

Assumpsit by Chauncey M. Blakeslee against Frederick F. Peabody for broker's commissions. Judgment for plaintiff. Defendant brings error. Affirmed.

Soule & Soule, for appellant.

Farr, Kolyn & Farr, for appellee.

MCALVAY, C. J. This suit was brought by plaintiff against defendant in assumpsit to recover a certain commission under an agreement made with defendant to furnish him a purchaser ready, willing, and able to purchase certain premises located in the township of Spring Lake, Ottawa county, Mich., at a price and upon terms fixed by defendant. The result of the trial was a verdict and judgment in favor of plaintiff for the amount claimed. Defendant, upon a writ of error, asks for a reversal.

There is little or no dispute between the parties upon the material facts in the case. The property in question was part of a considerable tract of resort property at that place owned by defendant, who resided in Troy, N. Y. He was acquainted with plaintiff, who was a contractor living at Spring Lake. On May 11, 1912, defendant wrote plaintiff a letter, the material parts of which are as follows:

"If you can find a purchaser for my whole property on Spring Lake * * * for $25,000 * * * * I will sell the whole property. * * * I hope you can find a purchaser for me, and if so, I am willing to pay you the usual commission of 2½ per cent."

Plaintiff found a customer for ten acres of it, upon which a bungalow was situated, and wrote defendant to put a price upon it. On June 5, 1912, defendant wrote plaintiff as follows:

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"*Dear Sir:*

"The lowest price I have put on the bungalow is $9,000. It includes, as you probably know, ten (10) acres of land. I hope you will succeed in selling it to Mr. Williams."

On June 10, 1912, defendant wrote another letter to plaintiff, as follows:

"I have had some correspondence with Mr. Williams and finally offered him the bungalow for $8,000, $2,000 cash and the balance in three years at six per cent. I think that is a very low price for the property and hope he will take it."

After receiving this letter, plaintiff had further negotiations with Mr. Williams, who agreed to take the property at that price and said he was going to New York and would stop at Troy and complete the purchase with Mr. Peabody. Mr. Williams, on arriving at Troy, went to the office of Mr. Peabody ready, willing, and able to take the property upon the terms fixed. He found that Mr. Peabody had sailed for Europe the day before, and was informed by Mr. Peabody's secretary that she was authorized to complete the transaction. Mr. Williams, who was examined as a witness for plaintiff, was not allowed to testify further as to what occurred in Peabody' office in Troy, because of the objection that no agency had been shown. Within a few days he returned to Spring Lake and took possession of this property and occupied it for several weeks, when, upon payment to him of $750 by an attorney who claimed to represent defendant, he quitclaimed all his right and interest in the premises to defendant. The action of this attorney was confirmed by defendant, as appears by an excerpt from a letter written by him to plaintiff's attorney, as follows:

"* * * My attorney afterwards paid Williams a consideration for the annulment of the contract so as to clear the title but no sale was ever made to Williams in the proper sense of the term."

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The record shows that, after Mr. Williams was at Troy, all of the premises which defendant owned at Spring Lake were sold, on June 26, 1912, for $25,000 to a man named Morse through real estate agents in Grand Rapids, in whose hands they had been placed for sale for more than a year. The last letter above quoted was written by defendant after such sale and after his return from Europe, when plaintiff's claim against defendant had been given to his attorneys.

Defendant offered no evidence in the case and made a motion at the close of plaintiff's case for a directed verdict. This was denied, and after argument by counsel the case was submitted to the jury under the charge of the court with the result as stated. There were 27 assignments of error, of which very few require consideration, the most material of which is whether the court should have directed a verdict in favor of defendant.

It is the contention of plaintiff that under his agreement with defendant his duty ended when he had furnished a purchaser ready, willing, and able to complete the purchase upon the terms offered by the vendor. It does not appear to be disputed but that he found such a purchaser in Mr. Williams, who was ready, able, and willing to buy this property from defendant upon the terms fixed by defendant; nor is it denied that Mr. Williams went to Troy, N. Y., for the purpose of completing the purchase. Plaintiff's commission, however, did not depend upon a completed sale. This principle is so well established by the courts of this and other States that citations of authority are unnecessary.

It appears that the principal contention of counsel for defendant is that this consummation of the sale was defeated because there is no evidence in the record that defendant was notified of that fact. Plaintiff contends that the record not only shows defendant was notified that Mr. Williams would purchase this prop-

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erty, but that afterwards through his office he recognized and ratified the transaction. The evidence in the case conclusively shows that plaintiff secured this purchaser and notified defendant of that fact; that defendant took the matter up with Mr. Williams, and his letter shows that he gave him the terms and notified plaintiff by the letter what the terms were; that plaintiff then had further negotiations with him, and he agreed to the price and terms; and that Mr. Williams, for the purpose of closing the deal, went to defendant's office in Troy and so informed defendant's secretary, who said she was familiar with defendant's correspondence as she had written the letters; that Mr. Williams returned to Spring Lake, where he and his wife were let into possession of the premises by defendant's caretaker and plaintiff, who, being present, surrendered the keys of the cottage to Mrs. Williams. It appears to be undisputed that Mr. Williams retained such possession for several weeks. It was a question of fact for the jury to determine whether defendant, through his duly authorized agent, was notified that plaintiff had fulfilled his contract.

The matter of ratification rests upon what was done after that and the surrender of possession of the premises by Mr. Williams. There is no evidence in the case disputing the fact that defendant's attorney negotiated with Mr. Williams and upon payment of $750 to him received a quitclaim deed to the defendant of all his interest in the premises. The authority of this attorney is admitted in the quotation from defendant's letter given above. This, also, was a question of fact for the jury to determine.

There is a claim in the case that the authority to plaintiff to find a purchaser for this property was revoked by the sale to Morse. Upon the facts in the case upon which plaintiff relies for recovery, we do not think it is necessary to consider this proposition.

Error is assigned upon portions of the charge of

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the court and certain requests to charge as given, also upon the admission of certain testimony in the case. These have been examined with care, and we find that no reversible error was committed. The charge of the court, taken as a whole, fairly submitted the questions of fact in the case to the jury, and there was evidence to support the verdict.

The judgment of the circuit court is therefore affirmed.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred. MOORE, J., did not sit.

NORTHWESTERN COOPERAGE & LUMBER CO. v. RUBINSKY.

1. CONTRACTS—SALES—WORDS AND PHRASES—SCRAP IRON.
   Under a written contract to sell all the scrap iron owned by plaintiff at a place specified, defendant was not entitled to claim materials, dynamos and engines which were capable of being repaired and placed in running order.

2. SAME—CONSTRUCTION—PERFORMANCE.
   Failure of defendant to furnish shipping directions at the request of the vendors of certain scrap iron, the required information not appearing in the written contract between the parties, excused the vendor for not shipping the merchandise.

3. SALES—INTERPRETATION OF CONTRACT.
   Under the provisions of a contract of sale of certain scrap, specifying the kinds and prices, railroad weight at the point of shipment to constitute the basis of settlement, evidence that the railroad company weighed the respective kinds of material separately and the weights so found, was conclusive on the buyer.

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4. EVIDENCE—CONTRACTS—PAROL TESTIMONY.

Parol testimony is not competent to vary the plain, unambiguous terms of a writing.

Error to Muskegon; Sullivan, J. Submitted January 20, 1914. (Docket No. 132.) Decided June 1, 1914.

Assumpsit by the Northwestern Cooperage and Lumber Company against Henry Rubinsky for breach of contract. Judgment for plaintiff. Defendant brings error. Affirmed.

Cross, Vanderwerp, Foote & Ross, for appellant.

William Carpenter (G. R. Empson, of counsel), for appellee.

BROOKE, J. Plaintiff and defendant entered into the following contract:

"GLADSTONE, MICHIGAN, Feby. 9—09.

"H. RUBINSKY,
"Muskegon, Michigan.

"*Dear Sir:*

"This will confirm our conversation of even date whereby we agree to sell you and you agree to purchase and pay for what scrap iron we may have at Gladstone at the following prices f. o. b. cars, railroad weight at Gladstone to be final basis of settlement: Scrap, $8.50; sheet iron and saws, $3.00 per net ton.

"We also agree to pay you $300.00 for burner now located at Garth, with the privilege of moving same at any time during the coming summer. Your acceptance will constitute all the contract necessary between us, and shall be binding upon our respective successors, heirs, and assigns. All brass, copper, and dynamo is included.

"Yours truly,
"N. W. COOP. & LBR. CO.,
"F. P. BUSHONG.

"Accepted: H. RUBINSKY,
"Per—Harry."

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Certain scrap was delivered to defendant thereunder, but he declined to pay therefor. Plaintiff thereupon brought suit to recover the value of the same, filing its declaration in assumpsit, and serving a bill of particulars of its claim as follows:

1909.			
Feb. 22	5,800 lbs. sheet scrap iron at $2.75 per net ton	$	7 98
	41,200 lbs. cast scrap iron at $8.50 per net ton		175 10
27	7,300 lbs. sheet scrap iron at $2.75 per net ton		10 04
	43,000 lbs. cast scrap iron at $8.50 per net ton		182 75
	4,900 lbs. sheet scrap iron at $2.75 per net ton		6 74
	105,525 lbs. cast scrap iron at $8.50 per net ton		448 48
			$831 09

Loaded in Car No. 40776-30545-32852.

To this declaration the defendant filed a plea and notice. Generally speaking, the notice sets out that plaintiff had made breach of the contract, in that it had not delivered to defendant all of the scrap bargained for, and that therefore the defendant had lost the difference between the contract price and its value —about $6 per ton, a total of $900—that no brass, copper, or dynamos were delivered, and that he should have received 3,200 pounds of this material, and which was worth $251.51 per net ton in excess of the agreed price of $8.50 per net ton, entailing a further loss on defendant of $403. Further, that plaintiff failed to deliver to defendant 15 tons of sheet iron and saws, which were worth $8.50 per net ton, an excess of $5.50 per net ton over the agreed price of $3, entailing a further loss on defendant of $82.50. Defendant asked that his damages occasioned by the alleged breach of the contract by plaintiff should be ascer-

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tained, and such portion as was necessary set off against plaintiff's claim, and the balance thereof certified in his favor.

At the close of the testimony, the court directed a verdict for the plaintiff in the sum of $759.70.

Defendant's assignments of error are grouped under two heads: (1) Error in directing a verdict for plaintiff; (2) error in the admission and rejection of evidence.

It appears that the scrap actually shipped was shipped on February 22 and February 27, 1909; that thereafter plaintiff made frequent demands upon defendant for payment. On April 3, 1909, plaintiff wrote defendant the following letter:

"GLADSTONE, MICH., 4/3/09.

"MR. H. RUBINSKY,
"Muskegon, Mich.

"*Dear Sir:*

"We have yours of the 31st ult., and, replying, you are laboring under a mistake or misunderstanding, as we shipped you practically all the scrap we had, except a little that we were not able to gather up out of the snow, but it is not enough for a car load.

"As to the brass, copper, and dynamos. The dynamos we sent to shops and will repair. There was no brass, except a couple of small quarter boxes, and, inasmuch as we are repairing two or three of the engines that went through the fire, these small boxes are being used. We shipped no scrap to other parties, except such as we are getting repaired to use again in our mill, and you must know that we are entitled to do this. You are taking a very technical position indeed in suggesting the things you do in your letter. We have given you an absolutely fair deal in every respect, and do not take kindly to such a letter as you have written. We treated this matter properly when you were here, giving you preference when we could have shipped the iron to better advantage to other people, because we had done business with you in some of the material at Garth. Furthermore, every dollar's worth of material we ever bought of you at Garth we paid you spot cash right in our office. Now you

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come along with a letter such as you have no right to write. We are entitled to settlement long ere now for the iron shipped you, and will ask you to kindly send us remittance promptly.

"We also note you mention a difference in your weight and the railroad weight. We do not know why there should be any difference, as you know we are not interested in same as the basis of the sale to you was railroad weights to govern. We have evidence to believe the railroad weight is correct and furthermore we are shipped hundreds of cars per month of all kinds of material that are weighed over the railroad scales at Gladstone and we find their weights in every case to be very accurate.

"We called your attention to the matter of the 2 per cent. that was on our invoice in some way by oversight. Such terms as you know, are not known to the trade at all, and we surely are as much entitled to our money when this iron was shipped, as you are to expect spot cash for material we buy of you. The raising of the question in your letter and intimations made will not tend to make future business with you very desirable, unless you are disposed to treat this matter in exactly the spirit in which the deal was made.

"We shall expect to hear from you promptly, so that we will know exactly where we are at in this matter."

On May 17, 1909, defendant wrote plaintiff the following letter:

"May 17, 1909.

"NORTHWESTERN COOPERAGE & LUMBER CO.,
"Gladstone, Mich.

"*Gentlemen:*

"Replying to your favor of the 15th inst., I have to say that my contract provides that I shall receive all scrap which you had on your premises at the time that contract was made, and should also have all brass and dynamos; and I am surprised that you should have shipped any of the material covered by my contract, when you knew that I was entitled to it.

"I want a full statement showing what became of this material, through which I am entitled to, under my contract.

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"When I get this information, I will be ready to adjust this matter; but you certainly could not ask me to settle until you comply with the terms of this contract fully."

After some further correspondence, plaintiff wrote defendant as follows:

"GLADSTONE, MICH., 5/15/09.

"MR. H. RUBINSKY,
"Muskegon, Mich.

"Dear Sir:

"We are in receipt of yours of the 10th. In reply, we sent to Escanaba three of our engines, constituting in all two car loads, for repairs, just as was our right according to the deal with you. It developed afterwards that one of the engines was so badly burned that it could not be repaired, consequently it was scrapped. There was also, we believe, enough put in to make car load weight, but just what this was, we are at this time unable to state. Be this as it may, you know very well that our deal provided that we were to reserve such materials as we needed for our use or any of the material or this scrap that we could use and why you should be hanging back as you are is more than we can understand. It certainly has nothing to do with the adjustment of the matter. We will thank you, therefore, to clean it up promptly.

"Yours truly,
"THE NORTHWESTERN COOPERAGE & LUMBER CO.,
"By I. N. BUSHONG, Manager."

Fourteen days later plaintiff wrote the following letter:

"GLADSTONE, MICH., 5/29/09.

"MR. H. RUBINSKY,
"Muskegon, Mich.

"Dear Sir:

"Replying to yours of the 17th. As stated in our former letter, our agreement provides that we shall reserve any of the material that went through the fire that we can use in our rebuilding and what you are trying to get at in writing the way you do is more than we can understand. This was all set out very plainly in the contract, and, as you know, was also

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talked fully between yourself, my son, Mr. Staple, and myself when you were here. We sent car No. 93501, weighing 45,600 pounds, and car No. 28799, weighing 45,400 pounds, to the Chatfield Iron Works at Escanaba, and on these cars were five of our engines that were through the fire, and besides some other fittings. This is everything that has gone from here, except what has been loaded on your cars. All of this material we had a perfect right to reserve as contract provides. We need not have given you more than one car load if we did not wish to, but we have given you an absolutely square deal just according to the contract, and we ask you to come forward and settle now, or we shall have to take other measures. If you do not think we have been square with you, why don't you come over and investigate, and not be playing the coward as you are. We have in the neighborhood of two cars of scrap here yet, but you can rest assured that it will not be shipped until you change your attitude very much. What we want now is a settlement, or else we shall take legal proceedings very shortly. Your letters are entirely out of order. We have at all times kept within our rights. We are ready to demonstrate this to you any time you will come over and make the investigation.

"Yours truly,

"THE NORTHWESTERN COOPERAGE & LUMBER CO.,

"By I. N. BUSHONG, Manager.

"Two of the engines referred to have been repaired and are here. Three are still at the iron works in Escanaba, and you can very easily verify all we have said. We paid you cash for all the Garth material, hence your attitude is all the more ridiculous."

On June 30, 1909, plaintiff wrote the following letter:

"GLADSTONE, MICH., 6/30/09.

"MR. H. RUBINSKY,

"Muskegon, Mich.

"*Dear Sir:*

"We have had no advice from you with shipping orders for the balance of the scrap here and have now been waiting for nearly 30 days. If we do not hear from you within the next four or five days, as per

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our former letter, we shall sell this material in other directions, as we must have it off the ground.

"Yours truly,

"THE NORTHWESTERN COOPERAGE & LUMBER CO.,
"By B."

It appears to be defendant's claim that he was entitled to receive everything of metallic character belonging to plaintiff that went through the fire. Expert evidence was offered on the part of plaintiff as to what the term "scrap iron" included. We are satisfied that it cannot be held to include any material which is in a condition which will permit of repair. The correspondence clearly shows that the engines and dynamo were shipped by plaintiff for the purpose of repair, and that they were all repaired, with the exception of two of the engines, which turned out upon examination to be too badly burned to permit a restoration. The letter of plaintiff to defendant of June 30th, *supra,* indicates a willingness on the part of the plaintiff to deliver to defendant all the remaining scrap, even though the defendant had up to that time declined to make settlement for that which had been shipped to him in the month of February. Defendant did not comply with the request for shipping instructions, and therefore cannot be heard to complain that he did not, in fact, receive all of the scrap. It is therefore unnecessary to determine whether plaintiff was entitled to demand payment for the scrap already shipped and to decline to ship the balance in case payment was not made.

Under the terms of the contract, the railroad weight at Gladstone was to control. Defendant does not contend that he has not received according to the railroad weight the iron which at the contract price would represent the amount of the judgment against him. He does, however, claim that the proportion of cast scrap and sheet scrap was not such as is indicated by the plaintiff's bill of particulars. This claim is based upon

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the evidence of defendant's son, who claimed to have examined the scrap after receipt, and that it was three-quarters sheet iron and one-quarter heavier iron scrap. The record discloses that in loading the cars the cars were first weighed empty by the railroad company, and were then loaded with light scrap and again weighed, and thereafter the load was completed with heavier scrap, the various weights being taken by the weighmaster. Evidence of these weights was introduced at the trial, and we are of opinion that, under the terms of the contract, the defendant is bound by them, and cannot, after receipt of the material, question their accuracy.

Error is assigned upon the refusal of the court to permit the defendant to testify how certain words in the contract came to be inserted. The court was clearly right in the ruling, as the contract was plain and unambiguous, and must be construed by the court according to its terms.

Other errors are assigned as to rulings of the court in rejecting certain testimony. They require no discussion.

The judgment is affirmed.

MCALVAY, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

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FOGARTY *v.* MICHIGAN CENTRAL RAILROAD CO.

1. CUSTOMS AND USAGES—RAILROADS—EVIDENCE.
   In an action for negligent injuries to the employee of a sugar factory, who was injured by defendant's train in switching upon the property of plaintiff's employer, his testimony that he had been employed about ten days by the sugar company, that it was customary when defendant did switching in the yard of the factory for the conductor of the train or some other employee to precede the engine on the track to give warning of its approach, not corroborated by plaintiff's other witnesses who had been familiar with the conditions for a longer time than had plaintiff, and who testified that after the original warning no further effort was made to notify the workmen of the approaching train, except that a lookout was stationed on the first car, *held*, insufficient to establish a custom which would be binding on the defendant.
2. SAME—RAILROADS—NEGLIGENCE.
   A custom must be certain, uniform, invariable and notorious, that is, known to all persons of intelligence having to do with the subjects to which it relates.

Error to Bay; Collins, J. Submitted January 12, 1914. (Docket No. 47.) Decided June 1, 1914.

Case by John J. Fogarty against the Michigan Central Railroad Company for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed; new trial denied.

Watts S. Humphrey and *Cooley & Hewitt (Humphrey, Grant & Humphrey,* of counsel), for appellant.

Hall, De Foe & Hall, for appellee.

Plaintiff, a man 42 years of age, was employed by the German-American Sugar Company in Bay City as a common laborer. He started to work October 1, 1908, and was injured on October 11th.

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Defendant railroad operates a siding and several switch tracks in the yards of the sugar company. The southerly switch track runs from the main lead upon a curve in a southwesterly direction. This curve extends about 600 feet. The line then becomes straight and runs due west a further distance of about 600 feet to a post, where it ends. On the north side of this track, at a point just west of the curve, there is located a barrel shed, in front of which and close to the track there is a platform about 70 feet long and 4 feet high. The platform is only 2 or 3 inches distant from the side of a passing car. West of the barrel shed is located a large coal bin. South of the track the beet sheds stand. A lime kiln is located upon this track in which limestone and coke are used. This material is piled alongside the track, east of the barrel shed, awaiting use. The extent to which this material obstructed the view of a train approaching from the east is a matter of dispute. On the day in question it became necessary to remove some empties and place some loaded cars upon this track.

Following a conceded custom, the conductor of the switching crew passed along the track and warned those working on or about the cars that a movement was to be made. At this time a partially unloaded car containing stone stood upon the track east of the barrel shed. Two men were at work in it, and they rode out with the train and back when it was pushed in. Having taken the train out and shunted the empties, the crew coupled onto a loaded coal car, and the train of four cars (the coal car being farthest west and the partially loaded stone car being next) was backed in upon the siding. While the train was being backed in a brakeman was stationed on top and at the west end of the loaded car for the purpose of seeing that the track was clear and warning any one who might be in danger. The engine was equipped with an automatic bell which was ringing at the time.

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Plaintiff had been afflicted with deafness to some extent for many years prior to his injury. He described the accident as follows:

"When I went through the opening and went onto the track I looked both east and west. There were no cars in sight from the point of vantage that I was viewing them from, but I saw the car before—when I got onto the track that day there was nothing in sight. There were no cars in sight. I saw a car standing out onto the track there right off the switch before I came into this opening. It was just over the switch where the switch leads off from the main line. I can point out on this Exhibit A about where that car stood. * * * I saw the engine working over on the north side. There were no other cars between this car that I have pointed out and the platform. There was just that one car. I saw where the locomotive that works in the yard was at that time. It was over on the north side of the building. It was right on the main track going into the main building. It was west of the switch that leads in on the south. The front end of the engine was headed toward the east. The locomotive was standing on the side track. I saw Mr. Coles, the switchman, around there. He was going over toward the office, the sugar company's office. I did not see any of the rest of the train crew. When I got up on the platform that day I went right into the storehouse and pulled the door open and set on a nail keg there and ate my dinner. There was not any one else eating dinner in there that day with me, but there was two fellows that went by me that waved their hands at me. One was Smith and the other was —I can think of the name later. There were no more than those two that went through while I was eating my dinner, that I know of, and they couldn't have went through unless I would have seen them. I was sitting about one foot from the door that leads into this storeroom when I ate my dinner. I could see out onto the track from where I sat. No trainman passed along on the track while I sat there eating my dinner. I was there about 20 minutes eating my dinner. After I had finished my dinner I closed up my basket. I had one of those square baskets, and went out on the platform. I did not eat all my dinner up.

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In the basket I had a glass filled with preserves (it was only about half full), and some tea, and a few sandwiches. I still had on these heavy boots. When I got out on the platform I went right out and I looked first to the east and then looked to the west. There was no car in sight nor no men nor nothing else in sight. * * * I was just inside this door; it was a sliding door; and the door was open about three feet. I got up and had my lunch basket in my right hand. I came out to the end of the platform; first looked to the east and then to the west; nothing was coming, and I turned around, got down like that with one knee, and had the basket in my hand; got this leg out about that way. I felt the jar of the train coming and I got all the way in except my heel. My heel got caught with the end of the flat car, the gondola, and that pulled me. There was a 2x4, a piece of hemlock, nailed to the platform on the outside, and I grabbed hold of that and hung onto that, but it dragged me along until pretty near the end of the platform before they came to a stop. Well, after they did stop, and the switchman came running from the east to me, and he went to take my leg out from the car, and I stopped him. I told him to leave it there until somebody came along. He wouldn't do it. He got hold of it with the toe like that and got the heel, and threw the leg out onto the platform. There was no use in my saying anything; I couldn't stop him from doing it. I was in that shape."

Upon the question of defendant's custom in giving notice when about to back in trains, plaintiff testified:

"*Q.* Going back to the trains backing in, had you ever seen a train backing in with merely the trainman standing on the end of the car or in the front end of the car as it was pushed in?

"*A.* The conductor of the train always went back down where the work was to be done and notified those people, whoever was working there, that he was coming in, and always stayed there until the work was done. This door that led out onto the platform was closed before I went there, but it was not closed after I got there, because I left the door open.

"*Q.* Was there anything that would have hidden

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from your view the conductor, if he had gone in, or any trainman, if he had walked ahead that day?

"*A.* There was nothing to obstruct my view at all. I had a clear view of everything in front of me.

"*Q.* Did you give notice and attention to whether any one came in or not?

"*A.* There was nobody could go by these unless I could have seen them.

"*Q.* Did any one go by at all? Did any trainman go by during that time?

"*A.* No, sir."

Upon the same question his first witness, Kelley, testified in part:

"*Q.* When the engine is coming in, what men is it, do you say, they notify?

"*A.* Men working around the cars there unloading beets or anything like that.

"*Q.* Working around the beet cars, or coal cars, or anything of that kind?

"*A.* Notify them around the cars there.

"*Q.* If they are working around the cars?

"*A.* Yes, sir.

"*Q.* They don't go into the factory and notify the people in the factory, do they?

"*A.* I don't know.

"*Q.* You never seen them do that?

"*A.* I never seen them do that; no.

"*Q.* Well, you don't say that when the engine comes in one of these railroad men run ahead of the engine in the yard?

"*A.* They always come ahead and notify us.

"*Q.* Before coming in on the track they stop the engine, don't they, and what other men comes in and notifies those men along that track that they are going to do switching?

"*A.* I never paid much attention if they stopped the engine or not, but they always have a man ahead.

"*Q.* He comes in and says to the men there, 'Look out, we are going to do some switching on this track,' don't he?

"*A.* Yes, sir.

"*Q.* When he does that they do not give any further notice there while they are doing that switching on that track, do they?

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"A. I never paid much attention to that.
"Q. You never knew them to give any more notice than that, did you?
"A. Always a man comes there and standing around there hollers to let you know they are coming in.
"Q. What do you mean by standing around there?
"A. He stands around there until they come in and take hold of the cars.
"Q. Suppose you are at work in the shed on a beet car, and he comes in and says, 'Look out, we are going to do switching on these cars,' then you stop work, don't you, while they are doing the switching?
"A. Why, sometimes we ride out on them.
"Q. Sometimes you ride out in the car?
"A. Yes, I have. * * *
"Q. Now, the only time they give you that notice is when they first come in to tell you they are going to do the switching?
"A. Well, yes, sir. The man rides in ahead on the loaded cars.
"Q. When they come back there is one of the men rides on the head car coming in?
"A. Yes, sir.
"Q. And that is all the notice they give, isn't it?
"A. The man ahead—
"Q. And that is all the notice that is given, isn't it?
"A. That is all I ever paid any attention to.
"Q. That is all you ever knew of being given?
"A. That is all.
"Q. Now, if before these cars were switched out of there, the conductor came in along that track and said to the men, 'Now, look out, we are going to do switching in here,' and then they would hitch onto the cars, switch them out, leave the empties, and come back in again on that track with the other cars, with a man standing in the front car, that would be all they ever do, wouldn't it, so far as you know?
"A. Yes, as far as I know."

Plaintiff's witness, Le Mere, testified on direct as follows:

"Q. Now, can you answer my question more distinctly whether it was the practice of the railroad company, before backing or sending a train of cars

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or the locomotive, for one of the trainmen to go ahead along the track and warn people?

"*A.* Yes, sir."

On cross-examination he said in part:

"*Q.* When the railroad men were going to switch on that track, I understand you that a railroad man would come in before the engine?

"*A.* I seen them lots of times. They would tell me to clean the track off if I had anything across the track. I knew they were coming in then to switch. If there were coal cars and lime cars in there that they were unloading, and to the west there would be empty cars that they wanted to take out, they would couple up the cars together and then they would pull out. I knew that those cars that were being unloaded would be shoved back in again. When those cars would be shoved back in again they would not run ahead again and tell me they were going to shove them in; I never knew them to do that.

"*Q.* When they would come back in, there would be a man at the front end of the car ahead?

"*A.* I have seen it that way.

"*Q.* And you would get no other warning except the first warning that you got when they told you they were coming in there to do work; that would be all the warning you would get about it, wouldn't it?

"*A.* That is all I ever got."

Plaintiff's next witness, Engstrom, on direct examination, testified:

"*Q.* What was the practice or the method adopted by the train crew of notifying the men working on the cars or about the tracks before they came in with the engine at the time of Mr. Fogarty's injury that fall?

"*A.* Well, the conductor used to come ahead and notify him when they came in with the engine.

"*Q.* During that fall, before Mr. Fogarty's injury, did you ever know of the train or the engine coming in without one of the men going ahead and notifying you?

"*A.* No."

On cross-examination:

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"Q. When you were working around the cars and they were going to do switching, what would the railroad men do; what would they say?

"A. Well, they say we are going to switch; 'Watch out for us,' they told me. Sometimes you stayed in the cars, sometimes jumped out. Then they would go ahead with the work, and we would watch out until they got through.

"Q. Suppose they wanted to take some empty cars out from the farther end of the beet shed and you were working unloading cars near the engine, they would come in and hitch onto your car and then onto the empties ahead, pull them back down over the switch, shove the empties on in on the main track, uncouple, and come back and put your cars back in the shed, wouldn't they?

"A. Yes, sir.

"Q. When they did that, did you used to ride in and out?

"A. Sometimes you would ride and sometimes step off.

"Q. When they would put those cars, those empties, onto the main, and were then coming back in again, they would not send a man ahead then, would they?

"A. They came ahead that time, too.

"Q. They would ride on the car in front, wouldn't they?

"A. Yes, sometimes walk.

"Q. When they came back in the car in front there would be a man in the front end riding in it coming back in?

"A. Yes.

"Q. So that if anybody was around there he could holler to him?

"A. Yes.

"Q. That is the way they came back, wasn't it?

"A. Yes, that is the way they are supposed to come back.

"Q. If this day that Mr. Fogarty was hurt, before they did the switching, the conductor came in and told the men working around the cars to 'look out, we are going to do a switch on this track,' and then they would come in and hitch onto the cars, the loaded cars and the empties ahead, pull them out over the switch, shove the empties in on the main, and then

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had a brakeman in the front car and shove back over the switch back in there, would that be the way they usually and ordinarily would do that?

"*A.* Yes, sir.

"*Q.* If they did that they did what they ordinarily did, didn't they?

"*A.* Supposed to do."

Plaintiff's fourth witness upon this subject testified:

"Did you ever know of trains to be backed in without somebody coming ahead to notify the men about the track at that time?

"*A.* No, I have not."

On cross-examination he said:

"I don't mean that when they switch on a track they notify the men more than once that they are going to switch. They come in when they are going to take out—make their switch—and when they are coming back there is some one in front, or sometimes they leave a man right in there, and they will go out and pick out a car and come back in, and this man is there all the time. Sometimes if they have switching to do they leave a man in there. If they have an empty to pick off, one man might take it out, and this fellow would wait until they come in with the load. When they come back coming in one man rides on the head car as a rule, I guess; sometimes they come ahead of it."

Frank Mann, one of the men who rode in on the stone car, an employee of the sugar company, and a witness for defendant, described the accident as follows:

"When they hitched on we stayed right in that car. We went up farther west, I guess, to drag some empty cars out there. Then they took us back to the main line. My partner was working in the car with me, Morris Schwartz. We both rode out in that car. They took us along. After they took the empties out they put them on the main track. We stayed on our car, and our car was right at the stone car; they took us along again. Then they took the coal car and shoved us in again. Then they brought us back in

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again on that track. The coal car was to the west of our car when we came back in on the track. Ours was the second car to that coal car. We were hitched right onto that coal car. The brakeman was in the coal car. I do not know what his name is. He stopped on the north side and had one foot on the car and the other foot on the coal. That car was a coal rack. There was no cover over the top. It was an iron rack; I don't know exactly how high they are. It was loaded clear to the top. He stood on top of the coal with one foot on the coal and the other on the front. He did not stand there all the way coming in. He jumped one car, and this was only a little bit in, and he walked through that, and he climbed upon the coal car, and he walked to the far end. He went through our car and then went onto the far end of the coal car. When we were coming in there I did not see Mr. Fogarty. I didn't look. What called my attention to Mr. Fogarty was I heard the brakeman holler. Then I flagged the car. I looked up and I went right inside and looked and saw Mr. Fogarty sitting there. He was sitting about eight feet from the west side of the platform. He was sitting about like I am sitting, a little to the west like this. His feet was hanging down over the platform. When the brakeman hollered he did not look up. The brakeman hollered more than once. I hollered. He did not look up. I did not then see anything done by the brakeman or anybody. The brakeman flagged the car, and they stopped. I did not exactly see the car and Mr. Fogarty when the car hit him."

This version of the accident was corroborated by Schwartz, the other laborer in the stone car, and by High, the engineer of the train.

BROOKE, J. *(after stating the facts).* We have set out somewhat at large the testimony relating to the custom of defendant in giving notice when about to back in cars upon the side track for the reason that the sole negligence of defendant is predicated upon its failure to observe an alleged custom to send a man in over the track in advance of the train to warn plain-

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tiff of its approach. In our view of the case it becomes unnecessary to consider the question of plaintiff's contributory negligence upon which much could be said even if plaintiff's statement be taken as absolutely true. Nor is it necessary to determine his status as a licensee or otherwise. He relies for recovery upon the establishment of a custom, the breach of that custom by defendant, and his injury in consequence thereof. A careful reading of all the testimony offered on behalf of plaintiff convinces us that no such custom as he testified to obtained in the yard where he was injured. His observation covered a period of but ten days, while that of his witness Kelley covered a period of five or six campaigns, of his witness Le Mere, from the time the sugar company started operations, and his other two witnesses an indefinite but apparently extended period.

It is unnecessary to consider defendant's evidence upon the point which was to the effect that, after the original warning, a man was never sent in ahead of a train being backed in on an empty track. A brakeman was always placed upon the front end of the forward car to see that the track was clear. The most that can be said of plaintiff's evidence, taken as a whole, is that sometimes the defendant sent a man in advance of a train being backed in and sometimes stationed a brakeman upon the front end of the forward car. This situation was not such a one as would warrant plaintiff in the belief that he would be personally notified of the approach of an oncoming train by a man sent in advance. It is undisputed that an effort was made by the brakeman to warn him. This warning proved abortive either because of plaintiff's deafness or because of the noise caused by dumping stone into the lime kiln.

A custom must be certain, uniform, and invariable. It must also be notorious; that is, known to all persons of intelligence having to do with the subject to which

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it relates. *Ledyard* v. *Hibbard*, 48 Mich. 421 (12 N. W. 637, 42 Am. Rep. 474); *Black* v. *Ashley*, 80 Mich. 90 (44 N. W. 1120); *Chicago, etc., R. Co.* v. *Lindeman*, 143 Fed. 946, 75 C. C. A. 18.

As defendant's negligence rested alone in a breach of an alleged custom which plaintiff failed to establish, we must hold that he failed to introduce any evidence tending to establish negligence on the part of defendant, and that therefore a verdict should have been directed in defendant's favor.

Judgment is reversed, and there will be no new trial.

MCALVAY, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

EMERY v. AIRTH.

DEFAULT—EQUITY PRACTICE—OPENING DEFAULT.

In order to obtain a decree in chancery permitting a defendant to open his default in omitting to answer the cross-bill of one of the joint defendants, a sworn answer should have been tendered as provided by Chancery Rule 7, and the application must be made within six months after the entry of default.

Appeal from Cheboygan; Shepherd, J. Submitted January 23, 1914. (Docket No. 55.) Decided June 1, 1914.

Bill by Mary Emery against Henry M. Airth and Arthur F. Watson for a decree discharging a certain

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mortgage as paid and satisfied and determining the amount due, if any. Defendant Airth filed a cross-bill for an accounting and the codefendant defaulted. From an order denying a motion to open his default, defendant Watson appeals. Affirmed.

J. J. Tweddle, for complainant Emery.

William N. Cross and *Victor D. Sprague,* for defendant Airth.

I. S. Canfield, for defendant Watson.

BROOKE, J. On November 24, 1897, complainant gave to defendant Watson her promissory note for $660, secured by a real estate mortgage covering certain lands described in the bill of complaint. On the same day defendant Watson assigned said note and mortgage, together with five other notes and mortgages, to defendant Airth as security for his note of $1,100, given to Airth. Complainant between the years 1898 and 1908 made certain payments upon principal and interest to defendant Watson, some of which were turned over to Airth by Watson. On November 8, 1911, complainant tendered to defendant Airth $145, which she claimed to be the balance due from her and demanded a discharge of the mortgage. This being refused, she filed her bill of complaint, alleging the payment to Watson of the several sums of principal and interest, alleging her ignorance of the assignment from Watson to Airth and averring that Watson was the agent of Airth. To this bill defendant Watson filed an answer admitting all the material averments, except as to the amounts paid. As to those he left complainant to her proof.

Defendant Airth filed an answer and cross-bill. He admitted the making and assignment of the mortgage as alleged, but denied that Watson was his agent to collect the moneys payable thereunder, and denied that

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complainant had made any payments upon principal or interest to said Watson as his agent, and claimed that there was then due him upon said mortgage the sum of $629.85; this sum being the balance due him from Watson on the $1,100 note. He prayed for an accounting as between himself, complainant, and defendant Watson, and for a sale of the mortgaged premises to satisfy any sum found to be due from complainant. Upon this cross-bill a subpœna was issued and duly served upon defendant Watson. Watson not having appeared, an order *pro confesso* was duly entered against him by the solicitor for cross-complainant Airth on June 5, 1912. On July 3, 1912, the case came on to be heard. The complainant and her counsel were present. Defendant Watson was represented by his counsel, Mr. I. S. Canfield, and defendant Airth by his counsel, Mr. William N. Cross. Testimony was taken in open court, and it was determined that defendant Watson was indebted to defendant Airth in the sum of $644.21, and that of this sum complainant should pay the sum of $272; that being the amount found to be due from her upon her note and mortgage. A decree was noticed for settlement on July 15, 1912. That decree provided that complainants should pay the sum of $272 to defendant Airth, and in default thereof her mortgage should be foreclosed, and further that defendant Watson should pay to Airth, as cross-complainant, the further sum of $372.21 with costs. On the same day (July 15, 1912) defendant Watson filed objections to the entry of any decree against him. It is necessary to notice the third objection only:

"Because said defendant Watson has not been brought before the court as a party defendant to said cross-bill."

The other objections are all such as should have been urged by way of demurrer or answer to the cross-

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bill. As to the third objection, the record conclusively shows that personal service of the subpœna issued on the cross-bill was made upon defendant Watson on February 20, 1912. The proposed decree was not finally signed until January 25, 1913. In the meantime, defendant Watson had filed an answer to the cross-bill and by his counsel now claims to have secured an oral order from the court that his default should be set aside and a hearing had upon the issues raised by his answer. On January 18, 1913, complainant Emery filed a petition in the cause asking leave to pay into court the sum of $272, and have her mortgage discharged. This petition came on for hearing on January 24, 1913, and the decree was signed the following day. On April 29th, defendant Watson filed a petition asking leave to be heard touching the issues raised by his answer to the cross-bill, voluminous affidavits and counter affidavits were filed, and the matter came on to be heard on July 7, 1913. The learned circuit judge made the following finding and order:

"In this matter it is made to appear before the court that a claim for appeal from a decree heretofore, on the 3d day of July, 1913, granted herein, was made by the said Arthur F. Watson on the 17th day of April, 1913, and a case proposed and amendments proposed to the case was this day brought on for consideration of the court, and there was also brought on for consideration before the court a petition dated April 29, 1913, in which it appears that 'the petitioner therefore appears in this honorable court and asks to be heard touching the matters of said decree and herein refers to his answer to the said bill of complaint now on file in said cause, and asks that he may be permitted to file the same, or such other answer as he may deem best in said case, and that upon the hearing said court will order that said decree be set aside, altered, or amended as to court may seem just, and that the court will grant the petitioner such other relief in the premises as to equity shall appertain,' and

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said petition coming on to be heard on notice, I. S. Canfield appeared for the defendant Arthur F. Watson, William N. Cross and Victor D. Sprague appeared for Henry M. Airth, and Mrs. Mary Emery was not personally represented, a full hearing was had upon the petition, an examination of the records and files made the answer of Mary Emery and Henry M. Airth to said petition of Arthur F. Watson, and the affidavits in support of said answer were all presented to the court, and after hearing counsel, and the court being fully informed in the premises, and after full hearing, the court doth find, order, adjudge, and decree as follows:

"(1) That the said Arthur F. Watson was duly and regularly served with subpœnas to answer the cross-bill, and his default for not appearing, answering, or demurring thereto was regularly taken.

"(2) That the defaults of said Arthur F. Watson were not set aside by oral order or other order of the court as alleged in paragraph 4 of said Arthur F. Watson's petition.

"(3) That a full hearing and trial of said case was had on July 3, 1912, and testimony taken, and that said Watson was represented by his counsel, I. S. Canfield, during a portion of said hearing had on the forenoon of said day, and he absented himself on the afternoon of said day without asking or obtaining permission of the court.

"(4) That on said July 3, 1912, after such full hearing, and argument of counsel, a decree was granted, and the terms thereof fully determined by the court, and that the decree finally entered is in accordance with the terms as then provided by the court.

"(5) That on July 13, 1912, a form of decree was presented to the court, after due notice given to Arthur F. Watson, and the other parties interested, and that there was present and represented at that time Mr. Cross, as solicitor for said Airth, and Mr. Canfield, as solicitor for said Watson, and that said Watson, through his solicitor, filed some objections and exceptions to the entering of a decree, largely based upon an affidavit in which it was claimed that the defaults of said Watson were irregular and illegal, and that no process had been issued against him under the cross-bill, and no service of said cross-bill had,

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which allegations as to nonservice of process and no service, this court thereafter found, and now finds to be untrue in fact, and that a subpœna was regularly issued against said Watson under said cross-bill and regularly served upon him, and his default thereafter regularly taken, and that all this occurred prior to the hearing and decree on July 3, 1912, the former decree, being taken under advisement by the court, was finally settled and signed as proposed by the court, and the same duly filed by complainant on January 25, 1913.

"(6) That since the decree was made and before the petition herein was filed, the status of the parties had changed, it appearing that under the terms of said decree Mrs. Emery had paid into court her money and had discharged the mortgage in question.

"(7) That on April 23, 1913, before the filing of the petition herein, the decree and all proceedings hereunder were enrolled.

"(8) That the decree heretofore made herein is in accordance with the justice of the case, and was duly and regularly settled according to law, and is hereby confirmed in every particular, and the petition dated April 29, 1913, of said Arthur F. Watson, is hereby dismissed as insufficient in law and fact to warrant the setting aside of said decree."

The decree so far as it affects complainant Emery appears to have received the assent of defendant Watson in open court. As between himself and defendant Airth he has no right to complain. He was personally served with process under the cross-bill and neglected to enter his appearance. He was in court by his solicitor when the cause came on to be heard, and his counsel seems to have participated for a time in the hearing when he absented himself, before the differences between himself and Airth were considered. There are two reasons why his default, duly entered, should not have been set aside: *First.* He did not tender a sworn answer as required by Chancery Rule 7. *Hews* v. *Hews,* 145 Mich. 247 (108 N. W. 694). *Second.* His application was not made within six months after the entry of his default. *St. Louis*

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Hoop & Stave Co. v. *Wayne Circuit Judge*, 155 Mich. 311 (118 N. W. 989), and cases cited.

The decree is affirmed, with costs.

MCALVAY, C. J., and KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred. MOORE, J., did not sit.

FUHRMAN *v.* SUN INSURANCE OFFICE OF LONDON.

1. INSURANCE—INSURABLE INTEREST—SALE OF INSURED PROPERTY.
   Evidence that plaintiff, suing to recover insurance on certain lumber, had sold the property but had not been paid in full and that he claimed that the scale as estimated by the buyer was deficient and fraudulent, that he stated the facts to the insurance agent of the defendant who made a personal examination of the lumber and his estimate confirmed plaintiff's claim as to the incorrectness of the vendee's scale, *held*, to support the contention that plaintiff owned an insurable interest, at least in such part of the lumber as had not been scaled or paid for, although the contract of sale provided that title should pass to the buyer upon inspection or payment of any part of the price.
2. SAME—FRAUD—CONCEALMENT.
   It was not necessary to show that plaintiff stated the exact amount which he had been paid on the deal, unless information was asked for by the agent upon that subject.
3. SAME—PAYMENT—EFFECT ON INTEREST OF INSURER.
   Receipt of a portion of the purchase price by the insured after the issuance of his policy did not avoid the policy or effect any change in the title of the property which remained in the possession of the plaintiff.
4. SAME—FRAUDULENT PROOF OF LOSS.
   Where the insured had stated the facts concerning the sale to the agent of defendant who was present when its adjuster investigated the loss, to whom the plaintiff men-

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tioned only one of the buyers who had contracted to take his lumber, and the plaintiff signed a sworn statement regarding his loss, but claimed to have overlooked the omission, there was no injury to the insurer shown which would avoid the policy for fraud.

5. SAME—FRAUD—PROOFS OF LOSS.

Also where the plaintiff claimed that he did not know anything about a false statement contained in a schedule attached to the proofs of loss and denied swearing to it, there was not such a fraudulent statement as would avoid the policy.

Error to Presque Isle; Emerick, J. Submitted January 21, 1914. (Docket No. 106.) Decided June 1, 1914.

Assumpsit by Gustave H. Fuhrman against the Sun Insurance Office of London upon a policy of fire insurance. Judgment for plaintiff and defendant brings error. Affirmed.

Joseph H. Cobb (Bates, Harding, Edgerton & Bates, of counsel), for appellant.

I. S. Canfield, for appellee.

On the 10th day of December, 1909, plaintiff, who was the proprietor of a small sawmill, entered into a written contract with the Michigan Manufacturing & Lumber Company, by the terms of which he agreed to sell all hemlock lumber and cedar that he would have during the following winter at a certain price per foot for the several grades and classes.

"Lumber to be delivered at La Rocque as directed by the second party. Cedar to be delivered at La Rocque as directed by the second party. Delivery to be made before March 15, 1910."

"All inspection to be done by A. J. Fortier or some other competent inspector to be furnished by said second party.

"The title to all material passes absolutely to the purchaser upon inspection of same, or upon any money being advanced on same."

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It was the plaintiff's claim that, attached to this written contract, was a paper writing containing specifications for the sawing of the lumber, and also a provision that, in case plaintiff was not satisfied with the inspection, he could have the lumber reinspected.

About the same time the plaintiff entered into an oral contract with one Reuben Mitchell, by the terms of which he agreed to sell to said Mitchell the hardwood lumber which he expected to manufacture during the following winter. Under these two contracts the plaintiff proceeded to manufacture certain lumber. This lumber he delivered as required by both contracts at La Rocque, where it was piled. Various advances were made to him from time to time by A. J. Fortier, representing the Michigan Manufacturing & Lumber Company and by Reuben Mitchell on account of the contracts. On March 15, 1910, a meeting was had between the plaintiff, Mr. Fortier, and Mr. Mitchell at Millersburg, where the account was gone over, and it was claimed by Fortier and Mitchell that a settlement was arrived at in the course of which the balances due to the plaintiff were determined and checks were given marked "in payment in full for lumber," which checks were afterwards cashed by the plaintiff. Plaintiff denies that this settlement was in full of his demands, and claims that the scale of the lumber in question was fraudulent. He notified both Mr. Fortier and Mr. Mitchell not to move said lumber until a rescale could be made. This being the situation on May 21, 1910, plaintiff applied to the defendant's agent, William Schmidt, for a policy of insurance upon said lumber. He claims to have disclosed to the agent Schmidt the exact condition of the title, that the scale given him by the scaler employed by Fortier and Mitchell was fraudulent and much too low, and that upon a proper scale his interest in the

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lumber then piled at La Rocque would amount to some $800 or $900. Whereupon, on May 21, 1910, the defendant caused to be issued to the plaintiff a policy of insurance in the sum of $600, covering said lumber, for which plaintiff paid a premium of $7.50. The policy was to run for four months. On June 14, 1910, the lumber was in whole or in part destroyed by fire. Plaintiff at once notified the agent of the defendant company, and a Mr. Spear, of Bay City, went to Mr. Fuhrman's farm north of La Rocque in company with Mr. Schmidt, the local agent, where the loss was adjusted at the sum of $520. The proofs of loss, which were in part prepared in Bay City, and in part at the plaintiff's farm, stated:

"The property described in said policy belonged, at the time of the fire herein mentioned, to Gustav H. Fuhrmann, and no other person or persons had any interest therein, except as follows: Agreed to be sold to Reuben Mitchell of Millersburg—no other interest."

It is the claim of the plaintiff that at this time he fully disclosed to Mr. Spear the fact that Mr. Fortier's company likewise had an interest in the lumber, and that he did not notice the omission of the name of the Michigan Manufacturing & Lumber Company in the description of the property. Upon receipt of the proof of loss the defendant company sent to the agent Schmidt a draft for $520 in payment of the loss, which Mr. Schmidt delivered to plaintiff, taking a receipt and a surrender of the policy therefor. This check was delivered by Schmidt to the plaintiff on June 29, 1910, and he thereupon wrote the following letter to the defendant company:

"SUN INSURANCE OFFICE OF LONDON,
"Chicago, Ill.

"*Gentlemen:*

"I herewith inclose you draft, duly indorsed, also receipts duly signed. As I cannot get the draft cash-

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ed here, you would oblige me if you would send me the currency by registered mail.

"Thanking you for your promptness in the matter, I am, respectfully yours,

"GUSTAV H. FUHRMANN."

This letter was received by the defendant company on June 29, 1910. On June 30, 1910, Reuben Mitchell sent a telegram to the company as follows:

"Defer payment of loss on lumber at La Rocque to Fuhrmann until investigated. See letter."

On the same day Mitchell wrote a letter to the defendant, to which the name of G. Covey, Jr., was signed by typewriter, as follows:

"MILLERSBURG, MICHIGAN, June 30, 1910.

"[On the letter head of Mr. Mitchell.]

"THE SUN INSURANCE CO.,

"Chicago, Ill.

"*Dear Sirs:*

"I understand your company had a recent fire on lumber at La Rocque station, Hawks post office, Presque Isle county, Michigan, on policy issued to August Fuhrmann, which loss has been adjusted and, I am told, paid. This lumber belonged to R. Mitchell, of Millersburg, Mich., and the circumstances connected with this indicate incendiarism and point suspicion towards Fuhrmann. Kindly do me the favor to furnish me with full details as to when the insurance was effected, by whom, its amount, and the proof of loss which were furnished to your company. As the matter stands, it now looks as if a crime had been committed, as well as a civil wrong, and I trust I may have your assistance in investigating this matter and punishing the criminal, if we can secure the evidence to do it.

"Very respectfully yours,

"G. COVEY, JR.,

"Prosecuting Attorney."

This letter seems to have been dictated by Covey, but actually written by Mitchell.

And on September 10, 1910, the following letter was written signed by Mitchell himself:

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"SUN INSURANCE CO.,
"Lansing, Mich.

"Dear Sirs:

"Your letter of August 18 received during my absence from home; hence this delay in answering. The matter of Fuhrmann has been placed in the hands of the prosecuting attorney, and we are awaiting developments. It matters not what Fuhrmann claims due him on the lumber. He has received every dollar for this lumber and cedar, according to contract prices, he is entitled to. If he has anything due on lumber, why don't he get to work and collect it from the people who he claims to owe him? They are all good.

"At the time of the fire there was not a foot of lumber anywhere around which belonged to any one beside myself and the Michigan Mfg. & Lumber Co. In regards to my oral agreement with Fuhrmann, I was to have the hardwood lumber at a price agreed upon, the inspector was agreed upon to do the inspection, and I was to pay him for his stock as fast as it was delivered at La Rocque, inspected, and in piles. This I did. I expect arrest will follow soon.

"Yours truly,
"R. MITCHELL."

The earlier of these communications having been received by the defendant about the time the indorsed draft for $520 reached its hands, it declined to return to plaintiff the money represented by said draft. On May 28, 1912, plaintiff brought suit against the defendant in assumpsit for the proceeds of said draft. The defendant defended the suit upon several grounds. Defendant claimed, *first*, that the policy was void because plaintiff had no insurable interest in the lumber; *second*, that, the description of the property and title thereto being false in fact, the policy was void; *third*, that the plaintiff was responsible for the origin of said fire; and, *fourth*, that the plaintiff's suit could not be maintained because of a provision of the policy, "that no suit or action on this policy for the recovery of any claim shall be sustain-

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able in any court of law or equity, unless commenced within twelve months next after the fire." Under these pleadings the parties went to trial, and plaintiff recovered a judgment for the amount of the draft, with interest. Defendant reviews the case in this court by writ of error.

BROOKE, J. *(after stating the facts).* Defendant first claims that the plaintiff should not be permitted to recover because, at the time the policy was written, he had no insurable interest in the lumber, for the reason he had been paid in full and accepted his money.

As nearly as we are able to determine from a careful examination of the record, it seems to have been the claim of Fortier, representing the Michigan Manufacturing & Lumber Company, that the plaintiff had been paid in full according to the scale sheets of McComb, the scaler employed by Fortier. The total amount of hemlock settled for according to said sheets was 36,523 feet. Mitchell claims to have paid according to the scale sheets for 26,551 feet. The plaintiff produced his scale book made at the time the lumber was cut, from which it appears that there was hardwood to the amount of 56,417 feet, and hemlock to the amount of 70,144 feet. The insurance agent before writing the policy in question made a personal examination of the lumber, counted the piles and the tiers in each pile, and estimated the amount at about 100,000 feet. It is apparent that, if the agent Schmidt's estimate was correct, there was at that time in the piles nearly 40,000 feet for which the plaintiff had not been paid. The record discloses that the plaintiff refused to accept the scale given him by Fortier and Mitchell, and had forbidden the removal of the lumber until a new scale could be made. Under these circumstances we are of opinion that the title to the lumber, or at least such portion of it as had

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not been scaled or paid for, remained in plaintiff.

Plaintiff's application for insurance was verbal; but Mr. Schmidt, the agent, testifies that he was told by plaintiff that the lumber was contracted to be sold to Mitchell and Fortier. Plaintiff does not claim to have disclosed to the agent the exact amount which had been paid him thereon. This, however, we think is unnecessary; the agent not having requested such information. *Guest* v. *Insurance Co.*, 66 Mich. 98 (33 N. W. 31); *Gristock* v. *Insurance Co.*, 87 Mich. 428 (49 N. W. 634); *Hoose* v. *Insurance Co.*, 84 Mich. 309 (47 N. W. 587, 11 L. R. A. 340); *Brunswick-Balke-Collender Co.* v. *Northern Assurance Co.*, 142 Mich. 29 (105 N. W. 76).

Upon this question, the court charged the jury as follows:

"Now, gentlemen of the jury, that is a question of fact what he informed Mr. Schmidt. That is for you to determine what he really did say to Mr. Schmidt. You have heard Mr. Schmidt's testimony, and you have heard his testimony. But I tell you, gentlemen, that unless at that very time he fairly and fully apprised Mr. Schmidt of what his real interest there was, that he could not recover in this case at all.

"But I also charge you, gentlemen of the jury, that if he at that time fully and fairly stated to Mr. Schmidt the truth—the truth—that he had an interest there in that lumber, that he had not been paid fully for the lumber, that he had an interest there of several hundred dollars, more than he had been paid, that he could recover in this case."

It is next urged that plaintiff cannot recover because the interest, title, and possession of the lumber changed after the policy was written and before the fire. This claim is based upon the fact that plaintiff received two small checks from Mr. Fortier and Mr. Mitchell shortly after the policy was issued. In view of the circumstances under which this policy was issued, and the contracts for the sale of the lumber covered by it which were known to defendant through

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its agent, we are of opinion that the receipt of these sums cannot be held to vitiate the policy. In other words, that it did not effect a change in the interest, title, or possession of the subject of insurance.

Defendant next urges that plaintiff cannot recover because he misrepresented the material facts and circumstances concerning the insurance, the subject thereof, after the fire, and in his proofs of loss. This claim is based upon the fact that Fortier's name was not mentioned as one of the vendees of the lumber in question. It is the claim of the plaintiff that he told the adjuster that Fortier, as well as Mitchell, was interested in the lumber, and it is admitted by the agent Schmidt that such information was imparted to him at the time the policy was written. As Schmidt was present with the adjuster at the time the loss was adjusted, it cannot be said that the insurance company was in any wise injured by the failure to include Fortier's name as a vendee in the description of the title. The paper itself was prepared by the defendant's agent. It was read to and signed by the plaintiff, who swears that he did not notice the omission of Fortier's name. *Knop* v. *Insurance Co.*, 101 Mich. 359 (59 N. W. 653); *Brunswick-Balke-Collender Co.* v. *Northern Assurance Co., supra.*

Attached to the proofs of loss was a schedule or statement of loss as follows:

> **Put nothing here except what assured actually agrees to and signs. All other statements and reports should be separate from proofs. Original amount lumber per estimate made by assured at time of piling:**
>
> | | |
> |---|---|
> | **Hardwood, 41,000 ft. cost at $10** | **$410 00** |
> | **Hemlock, 50,000 ft. cost at $8** | **400 00** |
> | | **$810 00** |
> | **Deduct for sold and del. 21,000 ft. hardwood** | **210 00** |
> | | **$600 00** |
> | **Less purchaser's interest per advance pmt. made.** | **80 00** |
> | | **$520 00** |

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This was made out from information which the adjuster Spear testifies he secured from the plaintiff. It is signed by the adjuster, and not by the plaintiff. It is contended by defendant that the record clearly shows that the last item therein, "less purchaser's interest per advance payment made, $80.00," is clearly false, as the record conclusively shows that a much larger sum had been paid plaintiff. Plaintiff denies all knowledge of this entry. Even where the false statement has been sworn to, it has been held not to void the policy in certain instances. *Tiefenthal* v. *Insurance Co.*, 53 Mich. 306 (19 N. W. 9); *Knop* v. *Insurance, supra; Walker* v. *Underwriters' Ass'n*, 142 Mich. 162 (105 N. W. 597).

The defendant next urges that, as the plaintiff relies upon the draft, his action is an action upon the case, trover, and not in assumpsit. With reference to this point, it is only necessary to state that the question was raised for the first time in a motion for a new trial. It will not now be considered.

Defendant's final claim of error is based upon three grounds: *First*, admission of the testimony; *second*, improper remarks of counsel; and, *third*, improper remarks of the court, and improperly conducting the trial of the case.

We are of opinion that no reversible error was committed in the admission or exclusion of the testimony. With reference to the two latter grounds, it is enough to say that the case for one involving so small an amount was rather unduly prolonged. The learned trial judge at times displayed some slight impatience; but we are unable to say that he disclosed any bias which tended to defendant's prejudice. His charge was very full and presented the issues to the jury in a manner entirely fair to defendant's claims.

The judgment is affirmed.

MCALVAY, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

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MERRITT v. WESTERMAN.

1. ADVERSE POSSESSION—LANDLORD AND TENANT—POSSESSION.
   Acts of ownership such as to openly and publicly indicate an assumed control or use of the premises, sufficiently sustain the claim of adverse possession; the occupation need not be such as to inform a passing stranger that the person in possession claims title, but if it would advise the owner in case he visits the premises that the person in possession claims to hold adversely the notice is sufficient.

2. EVIDENCE—CROSS-EXAMINATION—ADVERSE POSSESSION.
   Where it appeared from the proofs that the defendant's title by adverse possession was complete not later than 1897 and in 1907 the claimant entered into a contract to sell the premises, providing that $500 should be deposited in a bank to remain five years unless the cloud on the title was removed before the expiration of the period, the trial court did not commit prejudicial error in refusing to permit the plaintiff's counsel to cross-examine such witness relative to the reason for inserting the five-year limit.

3. SAME.
   Where the holder of certain tax titles put a tenant into possession, claiming to own the premises, and the tenant actually occupied the house and garden mentioned in the lease, and the instrument provided that he should permit no trespass, his occupancy was enough to apprise the original owners that an adverse claim was asserted.

Error to Manistee; Withey, J. Submitted January 21, 1914. (Docket No. 45.) Decided June 1, 1914.

Ejectment by James E. Merritt against Walter S. Westerman. From a judgment for defendant, plaintiff brings error. Affirmed.

Smurthwaite & Belcher, for appellant.

Max E. Neal, for appellee.

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KUHN, J. This cause has been before this court before and is reported in 165 Mich. 535 (131 N. W. 66), where the facts are sufficiently stated for a proper understanding of the issues involved. Being sent back for a new trial, it again resulted in a verdict and judgment for the defendant. The plaintiff brings the cause to this court by writ of error and claims that the testimony was insufficient to show adverse possession and that in the submission of the case to the jury and in the rulings and charge of the court there were material and prejudicial errors.

The first five assignments of error relate to the claimed legal proposition that, when a party claims an entry upon land on a date certain and under color of title, it is not competent to prove adverse possession after the expiration of limitation provided by the statute. The first alleged possession dated back to 1881, when S. W. Fowler, a lawyer, under color of a tax deed, put a tenant in possession. The circuit judge submitted the case to the jury both upon a claim of ten years' possession under color of title of the tax deed and also under claimed possession for fifteen years. With reference to this, he charged the jury, in part, as follows:

"It must be a continuous possession. And that, gentlemen, is the crucial question in this case I think, the closest question in the case on the testimony. It must be a continuous possession, in this case, for at least 10 years. Mr. Fowler owned these tax titles. If he went into possession of this land through Mr. Hull, claiming to own the land under his tax titles, and possession of the character which I am describing to you for 10 years consecutively would create a valid paramount title by adverse possession. If he did not go in claiming title under the tax deeds, then his possession must be of the same character for a period of 15 years before title by adverse possession will ripen and defeat the other title. The fact that these tax titles and tax claims were found afterwards to be void and worthless and of no force as

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deeds would cut no figure in this case. You may lay that question aside and not discuss it nor refer to it, because the law provides that when a man receives a deed of land from the State and goes into possession claiming to own it under that deed, and stays there and is adversely possessed of it in the way which I have described for 10 years, his title is good against everybody. And it does not make any difference that the deed is afterwards found to be void. But if he did not enter claiming under these tax deeds, but just entered without right and without claim of right, through Mr. Hull, then his possession, adverse possession, with all its constituent elements, must obtain for 15 years instead of 10 in order to make this title paramount and defeat the other title."

It is appellant's claim that there is only one theory in this case, viz., that the entry was under the tax deed as color of title, and that under this claim there was but one period of limitation, 10 years, by virtue of the statute. Section 9714, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 14119). The court permitted the defendant to offer testimony as to possession 18 years after the entry. It is claimed that, if the color of title is abandoned, then the defendant could claim only that part of the tract actually occupied, and there is nothing to extend the occupancy to the boundary of the land described in the deed. The so-called Richardson lease, dated January 26, 1889, it is claimed, limited the occupation to the house and garden. It reads as follows:

"MANISTEE, Jan. 26, '89.

"Be it remembered that George Richardson has rented the house and garden on place Richmeyer had on section seven, twenty-two, fourteen, for the improvements he made on the house and place, to live in until May, 1890, subject to sale by said Fowler. That he is to leave his improvements and they do and are to belong to the premises, but in case of sale, and he has to move and before time, he is to have his proportion of lumber paid back by purchaser, and he will

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permit no trespass nor cut any green or valuable trees or timber.

"GEORGE RICHARDSON.

"He may cut the maple tree, one tree back of the house if he sees fit to do."

On the back of this lease there is indorsed in the handwriting of Mr. Fowler:

"Leased to George Richardson, house on Sec. 7, 89."

This question was discussed in the briefs filed in the case when it was here before, and it seems to have had the consideration of the court, as the opinion says, page 537 of 165 Mich. (131 N. W. 66):

"We think, also, that there was testimony justifying an inference that these descriptions were occupied and used as one parcel, and that occupation extended to all of the land."

By the terms of the lease, while he only occupied the house and garden, as to all but Fowler he was in possession of the entire premises, as by its terms it was his duty to "permit no trespass," and this must be construed to refer to the Richmeyer place, which, it is conceded, is the land here in controversy. The actual occupation of the house and garden together with his duty to prevent trespassing was sufficient to fully apprise the original owners, had they been in view of the premises, that adverse claims were being asserted to the entire tract. The occupancy in the instant case comes within the rule announced in *Murray* v. *Hudson*, 65 Mich. 670, 673 (32 N. W. 889), where it was held that:

"It is sufficient if the acts of ownership are of such a character as to openly and publicly indicate an assumed control or use such as are consistent with the character of the premises in question."

In *Whitaker* v. *Shooting Club*, 102 Mich. 454, 459 (60 N. W. 983), this court said:

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"The occupation need not be such as to inform a passing stranger that some one is asserting title. If it be such as to notify and warn the owner, should he visit the premises, that a person is in possession under a hostile claim, it is sufficient."

We cannot therefore see how it was prejudicial to the plaintiff to have submitted to the jury the question of adverse possession for the period of 15 years. *Cook* v. *Clinton*, 64 Mich. 309 (31 N. W. 317, 8 Am. St. Rep. 816). An examination of the testimony in this case as to adverse possession shows that it was substantially of the same character as on the previous trial. We would not be warranted, therefore, in coming to a different conclusion than was had in that case, viz., that it was not error to submit the question of adverse possession to the jury. *Merritt* v. *Westerman, supra*, and cases cited.

The lands were conveyed to the defendant by Isaac N. Hilliard on April 8, 1907. On April 10, 1907, Hilliard and the defendant entered into a contract which provided that as the parties had theretofore entered into a contract for the sale of the land and the remaining 40 acres of the same quarter section, and that as an interest in said lands was claimed by the plaintiff herein, as agent for another person, $500 of the purchase money was to be deposited in a bank, to remain there for a period of five years unless the cloud upon the title was removed before that period. This contract was admitted in evidence to show the interest of the witness Hilliard in the subject-matter of the litigation. He was asked on cross-examination why the period of five years was mentioned in the contract, and the court did not permit an answer. It is urged that this was error, as it was proper to show this as bearing upon the question of the defendant's good faith. The title of the defendant, if perfected at all, was completed in 1891, under the ten-year period, and in 1896, under the fifteen-year period and

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the contract in question was entered into several years later. The contract does not disclose any waiver or nonclaim of his own title by adverse possession on the part of Hilliard or on the part of Westerman. We do not think that limiting the cross-examination was prejudicial error under the circumstances of this case.

We are satisfied that the case was fairly tried and submitted to the jury with a proper charge, and the judgment is therefore affirmed.

MCALVAY, C. J., and BROOKE, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

McCOY *v.* MICHIGAN SCREW CO.

1. MASTER AND SERVANT—INDUSTRIAL ACCIDENT BOARD—PERSONAL INJURIES—PROXIMATE CAUSE.

   Where an employee's eye received an injury from pieces of steel flying from a lathe that he was operating and the eye became infected with gonorrhea with which the employee was afflicted, the loss of his eye, resulting from the disease, did not arise out of and in the course of his employment under the workmen's compensation law. Act No. 10, Special Session 1912 (2 How. Stat. [2d Ed.] § 3939 *et seq.*).

2. SAME—EVIDENCE—BURDEN OF PROOF.

   The burden of furnishing evidence from which the inference can be legitimately drawn that the injury arose out of and in the course of his employment rests upon the claimant.

Certiorari by the Michigan Screw Company to review an award of the industrial accident board to

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William McCoy, claimant. Submitted January 23, 1914. (Docket No. 62.) Reversed June 1, 1914.

Stevens T. Mason, for appellant.

Edmund C. Shields, for appellee.

KUHN, J. The claimant, William McCoy, was employed by the contestant and appellant as an operator on a lathe machine. On February 1, 1913, several small pieces of steel from the machine on which he was working lodged in his eye. This, it is claimed, caused an irritation and caused him to rub his eye. At the time, claimant was being treated by Dr. A. M. Campbell for gonorrhea. On February 7th he went to Dr. Cochrane, who removed four pieces of steel from the eye. The next day the doctor removed another piece of steel and discovered that the eye had become infected with gonorrhea. He was then sent to a hospital and subsequently lost the sight of the eye. The industrial accident board affirmed an award made claimant by an arbitration committee of $6.49 per week for 100 weeks.

It is the claim of contestant and appellant that the loss of the eye was not the result of a personal injury arising out of and in the course of claimant's employment, but was the direct result of a disease unconnected in any way with his employment. At the hearing before the industrial accident board, four physicians were sworn, who testified as to the effect upon the eye of gonorrheal infection.

Claimant contends that the germs would not have entered the eye had not the steel caused "(*a*) an inclination to rub—the inciting cause—(*b*) inflamed condition which made the eye susceptible to the entry of the germs, as in the case of blood poison and erysipelas."

A careful reading of the testimony of the physicians shows that the infection can easily be caused

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to a normal eye by rubbing the eye with a hand infected with the gonorrheal germ. Dr. Bret Nottingham testified:

"*Mr. Mason:* And will you say as an expert how gonorrhea can be communicated to the eye? Is it by germ or otherwise?

"*A.* Yes; it is a contagious disease of course, produced by this germ, and a person, in caring for themselves as they have to, get some of this pus on their finger containing the germs, and of course, the eye being irritable, would rub the eye with the finger containing this pus.

"*Mr. Mason:* No doubt that infection of the eye was caused by the entering of gonorrhea germs. Could that infection occur if there was no injury in the eye?

"*A.* Yes.

"*Mr. Mason:* Therefore, if a perfectly normal eye will be rubbed by a hand infected with the germ, it will infect the eye.

"*A.* It might be very easily infected; a normal eye can be infected in this same manner.

"*Mr. Mason:* Suppose this boy had not had any injury to his eye, and had rubbed his eye; would it be possible that he could have lost his eye?

"*A.* Yes; the same result might have been obtained."

Dr. Cushman testified:

"Gonorrhea is one of the most common conditions that there is perhaps, and it is an admitted fact, without any argument upon what we are supposed to know, that the gonorrhea germ will attack and penetrate the unaffected covering of the eye. I have heard it said on reasonably good authority that it is perhaps the only germ that will attack an uninjured eye; but the fact of there having been this injury to the eye from the steel, without any question in my mind, has lowered the resistance of the eye, that is, weakened it, and made it less resistant to the infection. With the inflammation, it was much more probable that the eye become affected. Now, if the infection of gonorrhea was easier transmitted to the eye, there would be probably about 50 per cent. of us running around

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blind. That is, gonorrhea is common, and you don't see many blind. I have heard that 90 per cent. of the men in a certain town either have or have had gonorrhea, and 90 per cent. of the men haven't got bad eyes, and probably have been careless about their fingers. The presence of an injury to the eye makes it far more probable that the eye will become diseased."

Dr. Cochrane testified:

"*Mr. Mason:* Dr. Cochrane, did you examine this William McCoy; on what date?

"*A.* February 7th.

"*Mr. Mason:* He came to you for what trouble?

"*A.* He complained of steel in his eye.

"*Mr. Mason:* Did you take the foreign bodies?

"*A.* Yes.

"*Mr. Mason:* Where were they in the eye?

"*A.* On the upper lid on the under side.

"*Mr. Mason:* Were they in a place where they would have been apt to give very serious injury to the eye?

"*A.* Not serious injury; they would produce irritation.

"*Mr. Mason:* Does the present loss of the eye result from these cinders having been in or from another cause?

"*A.* The direct cause is from the gonorrhea infection.

"*Mr. Mason:* Therefore the loss of the eye is the direct result of disease, and not of accident.

"*A.* The immediate cause is the disease.

"*Mr. Mason:* In other words, what we call the resulting cause is the disease.

"*A.* The immediate or direct cause.

"*Mr. Mason:* How did that gonorrhea get into his eye?

"*A.* Probably from rubbing with his fingers.

"*Mr. Mason:* He had gonorrhea before that?

"*A.* I understand so.

"*Mr. Mason:* At the time you examined him did he have gonorrhea?

"*A.* I understand so.

"*Mr. Reaves:* You say, Doctor, that that was the approximate cause of the loss of his eye—the imme-

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diate cause—what would you say if he had not have had the steel in his eye?

"*A.* If he had not had the steel in his eye, he might not have rubbed his eye, at least not as vigorously as he did, and so he might not have infected the eye."

Dr. Campbell testified:

"*Mr. Atkins:* How much more chance would there be for his losing his eye after having the piece of steel in there, and the inflammation with it, how much more chance would there be to lose the eye?

"*A.* Just as soon as the infection gets in there I don't think it would make a great deal of difference. You are just as liable to lose the eye as soon as your infection gets there, whether you had anything in there or not. The point is here, your steel would be an inciting cause, and get infection on that account; but, once you get the infection, you are liable to lose the eye one way or the other. The point is here, there is an inciting cause from rubbing the eye; the effect of the steel being there, a man would be more liable to get infection of the eye, but, once your infection is in there, you will lose the eye from the gonorrhea infection. It does not make any difference how it gets in there, you will lose the sight partially or complete."

The burden of furnishing evidence from which the inference can be legitimately drawn that the injury arose "out of and in the course of his employment" rests upon the claimant. *Bryant* v. *Fissell*, 84 N. J. Law, 72 (86 Atl. 458); 3 Negligence & Compensation Cases Annotated, p. 585. Ruegg on Employers' Liability and Workmen's Compensation, p. 343, says:

"If an inference favorable to the applicant can only be arrived at by a guess the applicant fails. The same thing happens where two or more inferences equally consistent with the facts arise from them."

Boyd on Workmen's Compensation, § 559, says:

"The workman carries the burden of proving that his injury was caused by the accident and where he fails to do so, and where the evidence as to the cause of the injury is equally consistent with an accident,

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and with no accident, compensation may not be awarded him."

In the instant case it is not reasonable to say that he would not have rubbed his eye if the steel had not lodged there. He might not have rubbed his eye, it is true; but it is just as reasonable to suppose that he might have had occasion to rub his eye without this particular inciting cause. By the medical testimony it conclusively appears that the infection could have taken place if the steel had not been there. It must be said, from this record, that the loss of the eye was directly and immediately due to the infection caused by the gonorrhea, which it cannot be claimed is a risk incident to the employment. We are of the opinion that the facts are not capable of supporting the inference that the injury arose out of and in the course of the employment.

The decision of the industrial accident board is reversed.

McALVAY, C. J., and BROOKE, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

RANTA v. NEWPORT MINING CO.

1. MINES AND MINING — NEGLIGENCE — EVIDENCE — EXPERT TESTIMONY—WITNESSES.

On the trial of an action for injuries sustained in the mine of defendant by the giving way of certain timbers supporting a "raise," the opinion of a miner who had been in that line of employment for ten years and upwards and

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was familiar with the work of constructing raises, that certain timbering was usually done in a way which he described, was properly received in evidence and defendant's objection that he was not qualified to testify to the custom was correctly overruled, defendant not cross-examining the witness and attempting to raise the point by a general objection and where defendant's captain and foreman testified to similar facts. OSTRANDER, J., dissenting.

2. SAME—EVIDENCE.

Another witness who gave expert evidence as to the proper method of timbering was also correctly allowed to testify where he had been a miner for a long period and had seen the method of doing similar work and had practical experience.

3. SAME — EVIDENCE — MORTALITY TABLES — PERMANENCY OF INJURIES.

Evidence that plaintiff's leg was broken and became shortened as a result of injuries sustained in a mine, that he suffered other serious injuries, that some of them would be permanent to some extent, authorized the admission in evidence of the mortality tables; and it was sufficient to sustain a charge and verdict for future pain and loss of earning power and for future expenses.[1]

4. TRIAL—CHARGE—CLAIMS.

It was also proper for the court to state to the jury the claim of the plaintiff whose testimony supported the instructions.

5. SAME—SAFE PLACE—ASSUMED RISK.

The doctrine that it was the master's obligation to furnish a safe place, applied to the insufficient or defective construction of a raise in defendant's mine, which was not securely timbered or supported and gave way injuring the employee: the duty could not be delegated and as the evidence tended to show that plaintiff had no warning or knowledge of the danger he could not be held to have assumed the risk of the alleged negligence.[2]

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[1] On the question of mortality tables as evidence, see note in 40 L. R. A. 553.

[2] As to servant's assumption of risk in attempting dangerous work in obedience to orders, without fully appreciating the danger, see note in 4 L. R. A. (N. S.) 838.

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Error to Gogebic; Cooper, J. Submitted January 22, 1914. (Docket No. 65.) Decided June 1, 1914.

Case by Victor Ranta against the Newport Mining Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

C. W. Westerman (James G. Flanders, of counsel), for appellant.

O'Brien & Le Gendre and *George O. Driscoll,* for appellee.

KUHN, J. The defendant operates an iron mine at Ironwood, Mich., with the customary shafts, drifts, levels, sublevels, chutes and raises. From one of the main drifts, or levels, known as the fifteenth level, a perpendicular shaft, or raise, had been constructed, reaching upward to a drift 47 feet above, which was known as the forty-seventh sublevel. Mining operations were going on in this sublevel, and the raise in question had been constructed as a chute through which ore was dropped to the level below. It was divided by a partition into two perpendicular compartments, and, when the ore clogged in one of these compartments, a workman might be let down into the other to loosen the ore by pounding on the partition between.

At the time of the accident, the plaintiff, who had worked in mining operations for about two years, was employed as a marker on the top of this raise on the forty-seventh sublevel. It was his duty to mark how much ore the miners brought in and help the trammers turn the car on the turntable, keep the table free of dirt, and open the door of the car. He had been at this work one day, and was told by the shift boss to continue the work on the second day. The chute became clogged, and it is the claim of the plaintiff that the shift boss ordered him to go down the chute and loosen the ore, and that a rope was tied

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around his body and he was lowered down the larger side of the raise; that he was given a four or five pound hammer with which he was instructed to pound upon the dividers; that he had never done this work before; that no warning of the danger was given him; and that, while engaged in this work and suspended about ten feet from the bottom of the raise, the clogged ore started to run in the opposite compartment, and some of the dividers near the middle of the ore chute broke through, and ore, together with some of the dividers, fell, through the opening thus made, upon the plaintiff and caused the injuries of which he complains, and for which the jury awarded him damages in the sum of $5,000.

One of the grounds of negligence which were submitted to the jury was the claimed defective construction of the raise in question. Plaintiff's declaration describes the construction as it was, and as it is claimed it should have been, as follows:

"That said raise was of great size, to wit, 4 feet wide by 7 feet in length on the inside, and extending, to wit, from said fifteenth level, a distance of, to wit, 50 feet, upward to a certain sublevel therein, and was made and constructed by making an excavation or hole upwards from, to wit, said fifteenth level, and placing timbering, called cribbing, inside of said hole, to wit, 8 feet in length lengthwise, and 4 feet, in length crosswise, which cribbing was and is from 6 to 12 inches in diameter, and for the purpose of dividing said raise into two compartments, or holes, the defendant undertook to make a dividing or partition wall within the rectangular space formed by the inside of said cribbing, so constructed therein, as aforesaid. That defendant constructed said partition or dividing wall in said raise in the following manner, to wit: By nailing or spiking cleats of, to wit, two pieces of plank and lagging, about 4 or 5 inches apart, upward and downward on the inside of the timber or cribbing in said raise, and on opposite sides thereof, and then placing across said raise, so that the ends thereof would come within the said 4 or 5 inch space

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between said cleats of plank and lagging, certain lagging, to wit, cedar and other lagging, from the top to the bottom of said raise, and in this manner: Divided said inside space into two holes or compartments—and at the top of said raise, to wit, on said sublevel, defendant so built, constructed, and arranged tracks, platforms, and turntables that cars used for transporting or tramming ore in said mine could be conveyed to, and their contents dumped in, said raise, and so built and constructed an opening at the bottom of said raise, known in mining parlance as a 'chute,' that ore dumped in said raise, in said sublevel, could be taken, therefrom through said chute at the bottom thereof. That, in the use of such raises in like mines as said Newport mine, ore is at times dumped therein in such quantities as to fill, or partially fill, such raises, and at times such ore becomes clogged therein at divers points above the bottom thereof, while that part near the bottom thereof runs, and is taken out, through the chute at the bottom thereof, and there remains in the bottom of such raise a vacant space in one of the chambers of such raises, and it becomes necessary in order to loosen such ore, so clogged, as aforesaid, and to cause it to pass through such raise, for some person to descend into one hole or chamber of such raise and loosen such clogged ore and matter in the opposite chamber by striking upon the dividing or partition wall, producing a vibration, and thereby loosening and liberating the ore and matter in the opposite chamber, and causing it to fall to the bottom thereof, so that it can be taken therefrom through the chute therein; and that the work and operation of so descending into such chute and loosening and liberating such clogged ore is of an unusual and exceptional nature, and highly dangerous and perilous to the person performing the same, and great skill and experience is required in such person in order that he may escape injury while so doing. That the proper and safe way to build and construct such raises, and to place such partitions or dividing walls therein, is to build and construct the outside wall of such raise with good, strong, sound, and heavy timber, and to place crosspieces of like timber, securely set and placed into notches, grooves, or pockets made on the inside of such outside timbers, at distances of from 3 to 4 feet

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apart, and then to strongly and securely spike strong, sound, and heavy timber upward and downward at right angles with such crosspieces, on the side (or sides) of such raise, which is to be used as an ore compartment therein, but the plan and manner under which said 15 raise was constructed was and is of an unsafe, insecure, and dangerous kind and character, and it was and is extraordinarily dangerous and hazardous for any person (and especially an unskilled person) to descend therein and perform the work and operation of loosening and dislodging ore, as aforesaid, and such operation in such raise as said 15 raise was and is of a much more highly dangerous, perilous, and hazardous nature than to perform a like operation in a raise properly built, as aforesaid; and the timbers (both outside timbers and cross timbers) in said 15 raise were not of a sound, strong, secure, and proper kind, or of sufficient size and strength for use in such a raise, being, to wit, too small, weak, rotten, unsound, defective, and unrealiable for such use, which greatly increased such danger to such person so descending therein—all of which was at and at all times prior to the time of the occurrence of said injuries well known to the defendant, but unknown to the plaintiff, as the defendant well knew, or should have known."

Counsel for appellant has grouped the legal questions raised by proper assignments of error as follows:

(1) Admission of expert testimony relative to the method of constructing raises.
(2) The admission in evidence of the table of mortality.
(3) Instructions in reference to future suffering, future expenses, and future loss of time and earnings.
(4) Excessiveness of verdict.
(5) Improper assumption in the judge's charge of a fact which is contradicted by the testimony and the pleadings.
(6) Verdict contrary to evidence.
(7) Question of fellow-servants and safe place to work.

The first question relates to the qualifications of

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witnesses Kilponen and Koski to testify as experts as to the proper construction of raises in mines. Kilponen had worked as a miner for oven ten years, and his work had been building raises. He illustrated how the raise should be properly constructed by drawing a diagram on a blackboard. No question was asked him on cross-examination as to his qualifications, and the objection chiefly urged against his testimony is that he was allowed to testify as follows:

"*Q.* Have dividers been customarily put in in that way for the past six years in this vicinity, with the joggle in?

"*Mr. Norris:* That is objected to as incompetent, irrelevant, and immaterial and not a subject of expert testimony.

"*Mr. Driscoll:* I think he can testify as to the custom.

"*The Court:* Take the answer.

"*Mr. Norris:* Exception.

"*The Witness: A.* Yes, in all the mines; in all the Oliver Company mines. The reason that the joggles are put in that way is because it makes it more solid and strong and won't slip off."

No suggestion was made in the objection of counsel that witness had not sufficient knowledge of the custom to answer the question. The question called for competent, relevant, and material testimony, and no error was committed in permitting the answer. He further testified:

"It is necessary to have them strong and solid because lots of fellows have to be around there. Pipes run through, and there are pipe gang men. They have to be strong so that nobody won't get hurt.

"*Q.* How would they get hurt if they were not strong?

"*A.* If the raise gets blocked up with ore and then loosened, its heavy weight will break it or push them out, if the chute is blocked up.

"*Q.* What I want to know is whether it will do that with a chute that is properly built?

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"*Mr. Norris:* The last objection is renewed.
"*The Court:* Answer the question.
"*Mr. Norris:* Exception.
"*The Witness: A.* No, sir; it won't if it is correctly built. Where dry, soft ore is being run through a raise, and the raise has not been used to exceed about a month, the timbers would not rot within that time."

We cannot see how allowing the answers was prejudicial to the defendant, as both the defendant's mine captain and shift boss testified that, in order to withstand the strain, it was necessary to have the dividers strong and of proper length and firmly set against the opposite sides of the raise.

The witness Koski testified that he had worked in at least five different mines in the vicinity of defendant's mine; that he had built and helped build raises, but not before 1909; that he knew how raises were customarily built before that time, as he had been going through such raises three or four years before and had examined them to see how they were built. The testimony which gave rise to the objection was as follows:

"*Mr. Driscoll: Q.* Do you know how raises were built in 1909 and prior thereto?
"*A.* I have not been building them myself, but I have seen.
"*Q.* Then do you know how they were built?
"*A.* I saw it that they were built the same way as—
"*Mr. Norris:* Wait a minute; I object to that, if the court please. That question only calls for yes or no.
"*The Witness: A.* Yes.
"*Mr. Driscoll: Q.* Now, I ask you how they were built at that time?
"*Mr. Norris:* I object to that, if the court please, because the only evidence of this man himself as to his observation is simply that he went through them.
"*The Court:* You may take the answer."

The witness thereupon made a drawing on the blackboard and described the construction.

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"*Q.* Why are joggles put in those dividers?
"*Mr. Norris:* I object to that because he has not shown himself competent to testify as to those things in 1909 or prior thereto.
"*The Court:* Take the answer.
"*Mr. Norris:* Exception.
"*The Witness: A.* Because it is more solid and stronger."

Both Kilponen and Koski qualified themselves to the satisfaction of the trial judge to testify as to this construction, and, as both of these witnesses were miners of practical experience, we are of the opinion that no prejudicial error was committed in allowing the questions and answers objected to. 17 Cyc. p. 239; *Bettys* v. *Denver Township,* 115 Mich. 228 (73 N. W. 138).

The objection to the admission of the mortality tables is based on the claim that there was no evidence to show permanent disability. At the time of the accident, plaintiff was 23 years of age, sound physically, and in good health. As a result of the accident, his right leg was broken, there has been a shortening of about three-quarters of an inch, and also a limitation in the movement of his knee joint, which the physician testified will be permanent to some extent. Plaintiff also claimed that his face was swollen, his lips smashed, so that he could not eat solid food for weeks, and still show a scar about an inch long; that he was in the hospital five months lacking two days; that since the injury he has headaches, stomach and bowel trouble, and suffers pain, not only in the broken limb, but in his side; that he is unable to do hard work, such as mining, and the work that he does is attended with pain. There can be no question from this record that his leg is permanently injured, and it was therefore not error to introduce the mortality tables in evidence. *Haines* v. *Railway Co.,* 129 Mich. 475, 479 (89 N. W. 349).

We are also satisfied that the testimony offered to show the injuries was sufficient to support the in-

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structions of the trial judge with reference to future suffering, future expenses, and future loss of time and earnings. *Kuney* v. *Dutcher*, 56 Mich. 308 (22 N. W. 866); *Olson* v. *Village of Manistique*, 110 Mich. 656 (68 N. W. 986); *Styles* v. *Village of Decatur*, 131 Mich. 443 (91 N. W. 622).

The part of the judge's charge which is criticised as assuming a fact which is contradicted by the testimony and the pleadings is the part in which the court stated to the jury the claim of the plaintiff, which it was proper for the court to do, as the claim stated was supported by evidence. *Schweyer* v. *Jones*, 152 Mich. 241 (115 N. W. 974).

We are also of the opinion that the doctrine of safe place applies in the instant case. The plaintiff had nothing to do with the building, inspecting, or repairing of the raise, and he claims he was ordered to do this work by the shift boss, without any warning of the danger, and that he did not know of any danger. The duty to furnish a safe place was a duty which could not be delegated by the master; nor can it be said that the plaintiff assumed the risk. See *Orso* v. *Engineering Works*, 164 Mich. 568, 571 (129 N. W. 673), and cases therein cited.

The trial judge properly denied the motion for a new trial. We are satisfied that the evidence was sufficient to sustain the verdict and the amount thereof.

Judgment affirmed.

MCALVAY, C. J., and BROOKE, STONE, BIRD, MOORE, and STEERE, JJ., concurred with KUHN, J.

OSTRANDER, J. In my opinion the testimony of the witness Kilponen as to the custom of using or putting dividers in Oliver Company mines was incompetent.

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MYERS v. ERWIN.

1. LIMITATION OF ACTIONS—APPEAL AND ERROR—LAW OF THE CASE—JUDGMENT.

Upon the second review of a cause in the Supreme Court a finding in the first appellate proceedings to the effect that there was evidence in support of the plaintiff's contention as to the statute of limitations is conclusive and will not be reconsidered upon a similar record.

2. SAME—PAYMENT—JOINT OBLIGATION.

Payment by one of several joint obligors, without the authorization or consent of one of the others does not interrupt the running of the statute of limitations as to the latter: section 9745, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 14152).

3. SAME.

Held, also, that the court should have submitted to the jury the issues raised by the evidence of one of the defendants which tended to show that he had no knowledge of the alleged payments; and it was erroneous to direct a verdict for plaintiff on the theory that the claim was not barred by limitation of time under the statute.

Error to Muskegon; Sullivan, J. Submitted January 23, 1914. (Docket No. 100.) Decided June 1, 1914.

Assumpsit by Henry E. Myers and Edwin F. Holmes as administrators of the estate of John L. Woods, deceased, against the Muskegon Improvement Company, George L. Erwin and others upon a promissory note. From a judgment for plaintiff on a verdict directed by the court, defendant George L. Erwin brings error. Reversed.

Hatch, McAllister & Raymond, for appellant.

Clapperton, Owen & Hatten, for appellees.

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STEERE, J. This action is brought by the administrators of John L. Woods, deceased, upon a promissory note given to him by the Muskegon Improvement Company, having been executed by G. L. Mason, as president, and George L. Erwin, as secretary, and indorsed by George L. Erwin, G. L. Mason, F. L. Holbrook, David D. Erwin, and F. A. Nims.

Defendants interposed a plea of the statute of limitations which was sustained on a former trial in the circuit court, and on review reversed by a decision of this court reported in 169 Mich. 689 (135 N. W. 949), to which reference is made for a statement of the case and questions then passed upon.

Following the former decision by this court, application was made for a rehearing; one of the grounds urged being that certain facts were found and stated as a basis of the opinion which were not supported by the record. The application was denied. It is again urged that the evidence in this case does not sustain certain of the material facts found, and, if there is any testimony in the record so tending, there was also testimony to the contrary presenting disputed questions of fact; and on the second trial, in which a jury was demanded, those questions were for the jury.

On a retrial at circuit before a jury, the learned circuit judge directed a verdict for plaintiff, saying, after reviewing the testimony:

"Now, what I have said shows you that here is the same case, it is the same facts, and there is nothing left for the court or jury to do excepting to follow the law of that case, and that was * * * that the statute of limitations did not operate to bar the claim of the plaintiff."

The evidence is the same here as on the former trial, with the addition of the testimony of George L. Erwin, who is the only appealing defendant. He was not a witness upon the first trial.

Much of defendant's brief is devoted to a reargu-

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ment of the questions raised and argued in the case when here for review of the first trial, had before the court without a jury. The conclusions reached on the record then made and then before this court cannot now be reconsidered nor disturbed. Then all questions of fact as well as of law were before the court, and it was determined that the record contained evidence, though upon some points perhaps but inferential, to sustain and justify the result arrived at.

It is undisputed that the statute of limitations had run against this note, unless it is relieved from the force of said statute by one or more of the last three payments, discussed in the former opinion, and those payments would not stop the statute running in favor of appellant unless she is shown, either by inferential or direct evidence, to have consented to or authorized the same. A new promise will not be implied from a partial payment made by another under such circumstances as will preclude such inference.

The records of both cases show that, though he was a payor, the business of collecting and remitting payments, collected from collateral given to secure this note, was attended to chiefly by David D. Erwin, of the law firm of Nims, Hoyt, Erwin, Sessions & Vanderwerp. The payment of $82.23 was remitted by said firm, as shown by its letter dated February 20, 1904, sent with the remittance to plaintiffs. F. A. Nims, of said law firm, in seeking to avoid the effect of said payments, testified that he knew nothing about the collateral given with, nor of the payment made upon, such note. It was the opinion of this court when reviewing the first trial that, upon the record then made and considered in its entirety, Nims should be held to have known of and authorized such payments. On the second trial, by jury, the trial court held, as a matter of law, that appellant, "who testifies to the same facts, that he knew nothing about the payments that are indorsed upon the note and which it

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was alleged by the plaintiff in this case took it out of the statute of limitations," could not escape liability inasmuch as this court had previously held that a new promise should be implied by reason of such payments as to all defendants, including Nims.

Appellant, George L. Erwin, who was not a witness nor present at the former trial, here testified that he was never a member of nor connected with the law firm of which David D. Erwin and F. A. Nims were members and knew nothing about their transactions with John L. Woods, whom witness had never seen and did not know personally; that the Muskegon Improvement Company failed, turned over all its remaining property to trustees, held no more meetings, and went out of business in 1894, at which time he severed his connection with the concern; that he had been absent from Muskegon most of the time for 12 or 13 years and supposed the improvement company's matters were all closed up; that he had no interest in the collateral given to secure the note in question nor in any surplus which might arise therefrom after such note was paid; that he had no knowledge David D. Erwin made any collections on such collateral or any payments on said note subsequent to 1894, and had never, directly or indirectly, authorized or consented to the payments in question.

These were statements of fact not in the previous record. If they are true, the payments in question made by David D. Erwin without appellant's knowledge or consent would not deprive the latter of claiming the benefit of the statute of limitations which by his plea he has sought refuge under. Section 9745, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 14152); *Rogers* v. *Anderson*, 40 Mich. 290; *Gates* v. *Fisk*, 45 Mich. 522 (8 N. W. 558); *Borden* v. *Fletcher's Estate*, 131 Mich. 220 (91 N. W. 145).

There is evidence in this record, some of it documentary, tending to negative appellant's testimony,

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but the conflicting testimony raised issues of fact in the case which were not for the court to decide in a jury trial, and which should have been submitted to the jury under appropriate instructions as to their legal significance and directions as to what verdict should be rendered according as the jury might determine the facts.

The judgment is reversed, and a new trial granted.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

In re DAILEY'S ESTATE.

DAILEY *v.* MCCARTHY.

1. TRIAL—WILLS—EVIDENCE—CONDUCT OF COURT.
   Where the trial court excluded the opinions of some of the witnesses for proponent in a will contest, but later, after examining into the point, overruled the objection and permitted the witnesses to testify, any prejudice which may have resulted from the original ruling was cured.

2. WITNESSES — EXECUTORS AND ADMINISTRATORS—KNOWLEDGE OF DECEDENT.
   An administrator with will annexed, who appeared in a contest over the will as a party to the cause only by virtue of his interest as administrator of the estate but was not a proponent of the will, was not an opposite party as to the contestants within the meaning of 3 Comp. Laws, § 10212 (5 How. Stat. [2d Ed.] § 12856), excluding testimony of the opposite party as to matters equally within the knowledge of decedent. It was error to exclude questions of contestant's counsel what the admin-

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istrator saw and heard in an interview with the testator who was a near neighbor of the administrator and had known him well for 42 years.

Error to Kent; Cogger, J., presiding. Submitted January 23, 1914. (Docket No. 91.) Decided June 1, 1914.

Mary McCarthy presented for probate an alleged will of Dennis Dailey, deceased, which was allowed in the probate court and the contestants appealed to the circuit court; being joined by the said Mary McCarthy, in contesting the validity of the instrument. Martin Whalen, administrator of the estate of decedent, and the proponents bring error from a judgment denying the probate of the will. Reversed.

Powers & Eardley, for appellants.

Martin H. Carmody and *William F. McKnight,* for appellees.

STEERE, J. This is a contest over the last will and testament of Dennis Dailey, formerly of Wyoming township, Kent county, Mich., who died in the city of Grand Rapids on November 3, 1910, at the age of about 67 years, leaving an estate of uncertain value, consisting of over $3,500 of personal property and 40 acres of land lying close to the city of Grand Rapids, valued by certain witnesses as high as $10,000; the whole estate, however, being estimated in the petition for probation of his will at approximately $7,000. He never married, and was survived by a brother, Jeremiah Dailey, residing in Nebraska, a sister, Mrs. Mary McCarthy, and four nieces and nephews residing in Minnesota, and a niece and nephew apparently residing in Massachusetts.

On April 30, 1910, while a patient at a hospital in Grand Rapids, deceased executed the will in controversy, by the terms of which he bequeathed $600 to

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his sister, Margaret (Mary) McCarthy, $100 to his parish priest, $5 to each of four nephews and nieces, and the remainder of his estate to his brother, Jeremiah Dailey.

The instrument in question is in legal form, appearing on its face to have been executed in compliance with all statutory requirements. It was filed with, and admitted to probate in, the probate court of Kent county, on the petition of Mary McCarthy, after a contest in which she was one of the contestants, protesting against its admission to probate. Subsequently the proceedings were removed by appeal to the circuit court, in which she joined with other contesting heirs, where a trial by jury resulted favorably to the contestants. The contest was made upon the grounds of undue influence and mental incompetency.

It was claimed by contestants, and testimony was introduced tending to show, that the alleged mental incompetency resulted directly from an attack of apoplexy followed by partial paralysis, which came upon deceased but three days before the date of the will, and that failing health occasioned by hardening arteries naturally led up to, and caused, the apoplexy; that subsequent to the attack he was removed to a hospital, where he remained until his death, his mind being seriously impaired and enfeebled to such an extent that he was wholly incapacitated to understandingly transact any business, and mentally incompetent to make a will. This claim is further emphasized and elucidated by the testimony of experts, produced by contestants who, in answer to hypothetical questions pages in length, state that deceased must have been, and in truth was, suffering for a considerable time before the making of his will with general atheroma and arterial sclerosis, which were the superinducing causes of the apoplectic stroke, and that mental impairment and incompetency existed as the inevitable

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result of his malady; while experts called by proponent testify to the contrary in answer to equally long hypothetical questions, and say that deceased's mental condition at the time of the execution of his will was such that he was perfectly competent to transact such business understandingly, and possessed of sufficient testamentary capacity to dispose of his estate, asserting that, even though affected with the maladies testified to by experts upon the opposite side, it did not follow that his intellect was materially impaired, because persons affected with general atheroma and arterial sclerosis could be, and often were, mentally normal, and competent not only to understandingly make testamentary disposition of their property, but to follow intellectual pursuits.

In support of the will it was claimed, and testimony was introduced tending to show, that the condition of deceased on the day he went to the hospital was not such, nor so serious, as claimed by contestants, and did not result from a stroke of apoplexy, but from an attack of vertigo coming upon him while at work following a very hearty meal; that shortly thereafter he was able to walk and talk, and had possession of his faculties as before, although, realizing he was in failing health, he followed the advice of his pastor and went to the hospital, where he remained until his death, which was six months later; that at the time he went there and when he made his will he was in full possession of his mental faculties, knew his relatives and friends, visited with them, and discussed his business affairs, understood the nature and extent of his property and what disposition he desired to make of it; that, in speaking of his business matters with his brother, who had come to visit him, he asked for a notary to get his affairs settled, and, in compliance with this request, an attorney, who was a notary, was summoned and introduced to him, who, after some general conversation, prepared the will

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while alone with deceased in his room, summoning two nurses as witnesses when the instrument was ready for execution. They testified to facts showing compliance with legal requirements, and to testator's participation in, and apparent understanding of, what was being done, as indicated by remarks made by him while executing the will, telling the attorney, who started to read the will in their presence, that he need not read the rest of it, as testator knew all that was in it.

The two grounds of contest, upon each of which there was abundance of sharply conflicting testimony, were submitted to the jury, in connection with the general charge of the court, by special questions, which, with their answers, are as follows:

"(1) *Q.* Was undue influence used upon Dennis Dailey in making the will in question? *A.* No.

"(2) *Q.* Was Dennis Dailey on April 30, 1910, at the time of making the will in question, mentally competent to make said will? *A.* No."

The question of undue influence having been decided by the jury in appellants' favor, the 201 assignments of error in this record, upon all of which we are advised appellants rely, relate to the issue of mental incompetency. A careful reading of the record convinces us that most of these are not well founded and call for no serious consideration. Many of them involve a contention that in the general conduct of the case the attitude of the court was adverse to those seeking to sustain the will, and prejudicial to a fair trial.

Nineteen assignments of error and many pages of appellants' brief are devoted to tentative rulings of the court sustaining objections to subscribing witnesses giving their opinion as to the mental competency of testator, at the time of executing his will; they having related their means of observation and facts upon which they based their opinions. One of

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these witnesses was allowed to testify to her opinion before leaving the stand; the other later. Although the latter's testimony was insisted upon and considerable discussion had, the court expressed a purpose to further investigate the question before admitting the testimony and said:

"If I am satisfied later that I am wrong about that I will not hesitate to reverse the ruling."

This occurred during a session of the court on Saturday, and at the opening of court on Monday the court called up the matter of this ruling, stated he had announced at that time he would investigate the question and might change said ruling, and that, after giving the matter some study, he had decided the testimony was competent, and he would allow it. The evidence of the witness was thereupon introduced. Full latitude was finally given in the examination of both witnesses upon that subject. Counsel now insist the conduct and remarks of the court in the first instance belittled this testimony and were prejudicial, stating that such "prejudice to proponents would not have arisen * * * if he had less stubbornly refrained from ruling upon something with which he had absolutely nothing to do, and constantly reminding the jury that the opinion of those witnesses was not of sufficient value to be entitled to their consideration." The last utterance of the court upon such ruling was to the effect that he was previously mistaken and the opinions of those witnesses were entitled to be considered by the jury. We have examined all that was said by the court and counsel in connection with this matter, and conclude that the subsequent admission of the testimony obviated the error previously committed. *Cool* v. *Snover*, 38 Mich. 562; *Mason* v. *Partrick*, 100 Mich. 577 (59 N. W. 239). While other isolated remarks of the court pointed out by counsel as prejudicial might be considered as cap-

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tious, when considered alone, when read with the record as a whole, they do not impress us as of the import or importance contended for. We do not discover from this record that the court disclosed any opinion on the merits of the case or special inclination to favor either side of the controversy.

Some confusion appears in certain parts of the record, and possible misunderstanding, as to who were parties to these proceedings. The original proponent of said will, and, so far as the record shows, the only one who ever filed a formal petition for its probation, was Mary McCarthy, deceased's sister and a beneficiary under said will to the extent of $600. After starting the machinery of the court in motion, she, with other heirs, filed objections and contested the probation. The order admitting the will to probate recites that upon the date appointed for hearing said petition, and when objections had been filed by Mary McCarthy, Jeremiah Dailey appeared by counsel as proponent in support of said petition. The order made upon said hearing, after reciting in proper form the admission of said will to probate, appointed Martin Whalen administrator of said estate, with the will annexed. He and Jeremiah Dailey appear to be sometimes collectively referred to in the record as the proponents, although Whalen's name is first found in the records as administrator after the will was probated, and only in that capacity. He was not a proponent, and it was stated on the trial, by counsel for Jeremiah Dailey, that they represented Whalen only as administrator of the estate. He was called as a witness by proponent Dailey to testify to deceased's mental competency. Objections to certain questions asked him were sustained on the ground that he was an opposite party, precluded by statute from testifying to matters which, if true, must have been equally within the knowledge of deceased.

We are impelled to hold, under a well-settled line

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of authority, that the proposed testimony was erroneously excluded, and upon this record are unable to say this was harmless error. Whalen was a near neighbor of deceased, and knew him intimately for 42 years, seeing him often. Two days before he went to the hospital deceased called at witness' place and stayed about an hour. Witness also visited deceased while in the hospital, where he observed his condition and appearance and conversed with him. Objections were sustained to the following questions:

"*Q.* Well now, tell the court and jury what you observed and what you heard him say and what your conversation was at that time."

"*Q.* What have you to say as to his health and physical condition and his mental condition on these two occasions?"

The court ruled that this witness could give no conversations with deceased, nor testify as to what he talked about, nor the things said by him, nor state what witness observed as to his mental condition, nor express any opinion as to his mental competency based on facts seen and known by witness.

Contestants were permitted to thoroughly cover all this range of inquiry with witnesses of shorter acquaintance, and apparently less intimacy and opportunity for knowledge than Whalen. His proposed testimony bore directly upon the one controlling issue decided adversely to proponent, and was only rejected on the theory that he was an "opposite party," within the meaning of section 10212, 3 Comp. Laws (section 12856 [2d Ed.] 5 How. Stat.). Whalen was neither a propent nor contestant. He was not interested as an heir or legatee; the proceeding was not against him nor the estate as such; it did not seek to deplete the estate, but was only to obtain an adjudication of how it should be distributed. The statute did not apply to him. This subject has been fully adjudicated, and is discussed in its various aspects more or less

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directly in point in the following cases: *Brown* v. *Bell*, 58 Mich. 58 (24 N. W. 824); *Schofield* v. *Walker*, 58 Mich. 96 (24 N. W. 624); *Duryea* v. *Granger's Estate*, 66 Mich. 593 (33 N. W. 730); *Lautenshlager* v. *Lautenshlager*, 80 Mich. 291 (45 N. W. 147); *McHugh* v. *Fitzgerald*, 103 Mich. 21 (61 N. W. 354); *Moore* v. *Machen*, 124 Mich. 216 (82 N. W. 892); *Tabor* v. *Tabor*, 136 Mich. 255 (99 N. W. 4); *Ashley* v. *Smith's Estate*, 152 Mich. 197 (115 N. W. 1052); *Freda* v. *Tishbein*, 174 Mich. 391 (140 N. W. 502).

As this error demands a retrial of the case, we deem it unimportant and unnecessary at this time to further consider other questions raised.

The judgment is reversed, and a new trial granted.

McALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

LEPIRE *v.* KLENK.

EASEMENTS—NAVIGABLE WATERS—CANAL—PUBLIC WAY.

Evidence that complainant and other members of the public had used a canal from Lake St. Clair and the Detroit river to and through complainant's premises for many years, that part of it had been improved at the expense of the public and it had been dedicated to the public at the time defendant platted the surrounding land, also, that the stream was the only possible way by which complainant could reach the lake and river from his home, *held*, to justify the court in restraining defendant from obstructing the canal.

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Appeal from Wayne; Hally, J. Submitted January 6, 1914. (Docket No. 1.) Decided June 1, 1914. Rehearing denied December 19, 1914.

Bill by John B. Lepire against William C. Klenk for an injunction. From a decree for complainant, defendant appeals. Affirmed.

Lucking, Helfman, Lucking & Hanlon, for complainant.

Daniel P. Cassidy, for defendant.

MCALVAY, C. J. This is an appeal from the Wayne circuit court, in chancery. Complainant filed his bill in that court praying that defendant be temporarily and permanently restrained from obstructing a certain water course which complainant used in passing to and from his house, which was situated thereon, and that complainant and other members of the public "be decreed to have the right to use said stream for any and all purposes for which the public may lawfully use a navigable stream or public highway." A demurrer by defendant to the bill of complaint was overruled, and on an appeal to this court the order of the circuit court was affirmed. *Lepire* v. *Klenk,* 169 Mich. 243 (134 N. W. 1119, Ann. Cas. 1913E, 50). Reference is had to the opinion in that case for a brief statement of the allegations in the bill of complaint upon which complainant relied for the relief sought. Mr. Justice BROOKE, speaking for the court in that opinion, said:

"The bill of complaint in the instant case clearly sets out facts from which it is apparent that complainant suffers private and direct damage other and different from that suffered by the public at large. It further avers that the way in question is a public highway. For the purpose of determining the question now here, that fact must be taken as admitted by the demurrer. Under the facts alleged in this bill,

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if sustained by competent evidence, complainant is entitled to the relief sought" (citing numerous authorities).

Defendant then answered the bill, and a full hearing was had on the merits, which resulted in a decree in favor of complainant, granting him full relief as prayed. The case is now before this court upon an appeal from such decree. The question involved is whether, upon the evidence in the record, complainant is entitled to relief. A digest of the evidence produced by the respective parties and a discussion of the same would be of no benefit to the profession.

Complainant, by a preponderance of the evidence contained in the record, has sustained the material allegations contained in his bill of complaint: That said stream is a navigable stream or canal and a public highway and is the only way possible by which complainant by water may reach Lake St. Clair and the Detroit river from his home, which is located on this stream above the obstruction complained of. This navigable water has been used by complainant and the public freely, without objection or obstruction, as a navigable public highway for many years, and the upper part of it, below complainant's residence, has been improved at the public expense, and a large part of it was dedicated to the public use by defendant at the time this subdivision was platted by him. Complainant has also established the fact that the navigation of this waterway has been wrongfully and wilfully obstructed by defendant by sinking a barge across its channel.

It follows that the decree of the circuit court should be affirmed. Complainant will recover costs to be taxed.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

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ALGATE *v.* CITY OF LANSING.

1. APPEAL AND ERROR—TRIAL—DIRECTED VERDICT—EVIDENCE.
On error to review a directed verdict, the testimony of the defeated party must be taken as true and considered in the view most favorable to him.

2. CONTRACTS—BREACH—EVIDENCE—MUNICIPAL CORPORATIONS.
Evidence in an action against a municipal corporation for breach of a sewer contract that plaintiff was unable to get sufficient brick of the kind specified by the city engineer, who was charged with the duty of inspection, and that plaintiff substituted a kind of brick which was more expensive and conformed to the requirements of the contract, but the engineer rejected the work in which such material was employed and refused to give an estimate such as the contract provided for on work thereafter done in a proper manner by the contractor, *held*, to present a question for the jury whether the defendant had violated the agreement.

3. SAME—ARBITRATION—INSPECTION—MUNICIPAL CORPORATIONS.
A provision in a contract for the construction of a city sewer that all materials should be furnished by the contractor and approved by the city engineer before being used, did not make the decision of the engineer final and conclusive: nor was a further contract proviso that all work should be done in a neat, substantial, and workmanlike manner, "to the satisfaction of the common council, under the direction of the engineer whose orders are to be obeyed in all matters pertaining to workmanship or materials subject to these specifications," sufficient to vest in the city officials authority to finally pass upon work and materials used.[1]

4. SAME.
And whether or not the decision of the engineer was fair and reasonable so as to bind the parties, plaintiff was entitled to have an estimate on work which was not ques-

[1] The question of the conclusiveness as between municipality and contractor of decision of engineer or other empowered officer as to matters concerning contract for public improvement is treated in a note in 23 L. R. A. (N. S.) 317.

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tioned and which he had done after the rejection of the substituted brick: failure to furnish such estimate constituted an actionable breach of a contract that provided that estimates for partial payments should be made upon request of the contractor presented prior to Saturday of any week.

5. SAME—CONTRACTS—SATISFACTION.

The contract was not of the class known as satisfaction contracts, in which the taste or judgment of one of the parties is made the sole basis of acceptance or rejection, but if the work which was done by the contractor conformed in a reasonably sufficient manner to the requirements of the contract it was a complete performance and he was entitled to an estimate.

Error to Ingham; Wiest, J. Submitted October 13, 1914. (Docket No. 28.) Decided June 1, 1914.

Assumpsit by John H. Algate against the city of Lansing for breach of a contract for construction of a sewer. Judgment for defendant on a verdict directed by the court. Plaintiff brings error. Reversed.

Seymour H. Person, for appellant.

Joseph H. Dunnebacke (C. P. Black, of counsel), for appellee.

STEERE, J. Plaintiff, by a writ of error, seeks review and asks reversal of a judgment on a directed verdict rendered against him in the circuit court of Ingham county in an action brought upon a written contract entered into between him and defendant whereby he engaged to construct a sewer system for a portion of the city of Lansing according to certain plans and specifications made a part of said contract.

The system, involving an expenditure of near $40,000, contemplated an egg-shaped, trunk sewer built of brick and concrete, 72 inches from top to bot-

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tom at the lower end, and gradually growing smaller as it receded from its outlet, with several laterals of tile extending from the main sewer in different directions.

The contract, following a form approved and adopted by the common council of the city of Lansing on October 11, 1909, is an elaborate document covering 20 pages of the printed record, very full and complete as to all matters involved in the undertaking, with specifications divided and subdivided under headings as to method of construction, workmanship, material, and other details relating to different branches of the work and the rights, duties, and responsibilities of the parties. It was executed May 9, 1910, requiring the work to be commenced June 1, 1910, and completed not later than November 30, 1911. Further reference will be made to such portions of this contract as become material to questions which it is necessary to pass upon or consider.

Performance of the contract was entered upon, and the work progressed, under plaintiff's general control, but in direct charge of his son and other foremen; he being absent portions of the time looking after other contracts he had taken until July 10, 1911, when plaintiff took personal charge. About August 5th the city engineer, who was inspector by the terms of the contract, made objection to the manner in which certain work was done, and especially forbade the use of some red sand brick, in the trunk sewer, which was from the same brickyard but varied in color from that previously used. Just at that time the brickmakers were unable to furnish the light colored sand brick which had been previously used, and plaintiff, claiming that the red was just as good or better, more expensive, and fully complied with the specifications of the contract, continued its use for a time, until the other brick could be again furnished, building about 32 feet of the sewer with it.

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On August 10, 1911, the engineer sent plaintiff a written communication stating that on August 5th notice had been given him not to lay the red brick, and later to discontinue laying certain inverted stone in an unworkmanlike manner, with notice that no estimate would be given him for work done until the same was replaced according to specifications. This notice was received while plaintiff was unable to get the light brick, and he continued to use the red for a time thereafter, until authorized by the engineer to use a certain mud brick which the brickyard was able to furnish, when he continued with the latter, joining them to the red brick which he did not replace. During the time he was laying the mud brick the city engineer and chairman of the sewer committee were many times at the sewer and observed what was being done. The culminating and chief cause of friction between the parties appears to be plaintiff's refusal to replace the red brick with others. On August 18th plaintiff made written application to the engineer for an estimate claimed due him under the contract, with which to obtain a partial payment "on work done on said sewer, and not previously estimated by you," which was refused. Plaintiff continued the work for a time, until after the next meeting of the city council, and, being unable to secure an estimate or payment, withdrew his tools and men and discontinued work on September 1st, claiming defendant had violated the contract in not paying him the percentage due on work done according to the contract, and that he was unable to continue through lack of funds resulting from the city refusing to pay him money then due. On September 11th he received a communication of defendant, from the common council, inclosing a copy of a resolution directing him to proceed with his contract at once, or his bond for its faithful performance would be forfeited and he held responsible for all resulting damages. He sought legal advice, and on

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September 14th his attorney wrote the city engineer, stating the facts as plaintiff claimed them, and concluding:

"Kindly advise me, as Mr. Algate's attorney, if you will now make these estimates and when. Also whether you do withdraw your objections as stated in said letter, or still insist on same. Also if you insist on work being replaced as stated in said letter.

"Mr. Algate is entitled to the information that he may know how to proceed and is entitled to his money, in order to continue to finance the work."

On September 17th he sent to the city council copies of the correspondence and resolution accompanied by the following letter:

"LANSING, MICH., Sept. 17, 1911.

"HON. COMMON COUNCIL,
"City of Lansing.

"*Gentlemen:*

"Annexed you will please find copy of a letter to City Engineer Sparks; also copy of letter from said City Engineer Sparks to John Algate; also resolutions of common council to John Algate.

"Kindly advise us as to attitude of city in reference to matters mentioned in said letters. Your early advice will be kindly appreciated."

This communication was received and placed on file, but not answered. On August 23, 1912, this action was begun.

By the opposing claims of these litigants, as set forth in their elaborate pleadings, each charges the other with numerous violations of their contract in many detailed particulars.

The theory of plaintiff's declaration is a hostile attitude towards him manifested in the inspection of the work, which was unjust, captious, oppressive, and in effect fraudulent, in that proper material was repeatedly rejected, and the work objected to when being properly carried on in strict compliance with the contract; that the inspector hampered and interfered

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with the progress of the work by abusive and profane language and brutal conduct towards plaintiff's employees to an extent which rendered it difficult to keep men on the job, and captiously ordered work which complied with the contract to be changed and done again, refusing estimates and payments for work done, and not objected to, until such orders were obeyed, and by such refusal deprived plaintiff of the necessary means to continue.

The theory and claim of defendant, as indicated by its special notice under a plea of the general issue and lengthy cross-examination of plaintiff's witnesses, is that plaintiff persisted in slighting the requirements of his contract by faulty construction and inferior material, in defiance or evasion of the inspector, repeatedly violating the terms of his contract, and finally, when compliance was insisted upon, abandoned it.

Most of these conflicting claims presented by the pleadings involve issues of fact and call for but incidental consideration as the case is now presented by this bill of exceptions on a directed verdict, for in this inquiry plaintiff's testimony must be taken as true, and considered in the light most favorable to him.

On the trial of the case defendant offered no evidence, but moved the court for a directed verdict in its favor at the conclusion of plaintiff's testimony, for the following reasons:

"(1) Under the undisputed evidence in this case it appears that the plaintiff, on September 1, 1911, abandoned all work upon the contract which he had entered into with the defendant to construct the sewer in question, alleging for his reason therefor that the city engineer had refused to make and furnish to him an estimate of work done and material furnished, up to and including August 18, 1911, and not previously estimated, which estimate under the undisputed evi-

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dence in this case he was not then entitled to demand and receive.

"(2) For the reason that the plaintiff admits in his testimony that the city engineer had rejected certain brick which plaintiff was using in the construction of said sewer and notified the plaintiff not to use them in such work, and that he, the plaintiff, disregarded such directions of the city engineer and did use such brick in such work after he was so notified by the city engineer not to use them, and that it was for the work thus done with such rejected brick that he claims he was entitled to such estimate from said city engineer.

"(3) Because there is no evidence in this case from which any inference can be drawn that the act of the city engineer in rejecting the brick in question and notifying the plaintiff not to use them was not the exercise of his honest judgment.

"(4) Because the plaintiff did not, before he abandoned work upon said sewer, bring to the notice of the common council of the city of Lansing his reasons for such abandonment."

This motion was granted on the ground, as indicated in the reasons stated when directing a verdict, that the contract made the engineer an arbiter, and his decision on questions arising under it was final and conclusive, unless he acted fraudulently, and in bad faith, of which there was no competent proof; that the engineer had a right to and did reject the brick, and "it was his duty not to give plaintiff an estimate upon the city to pay for something he had rejected;" that plaintiff's own testimony showed he first violated the contract, abandoned the same, and did not fully perform it, and therefore could not recover upon it.

In leading up to these conclusions, the court stated plaintiff's rights in case of defendant's default in payments as follows:

"If he was entitled to an estimate, and without reason it was refused him, then he was justified in abandoning his contract, because one who performs

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work for another upon an agreement that from time to time as he has performed part of it he shall have his pay is entitled to his pay, and, if he does not get it when he is entitled to have it, then he need not proceed with further performance of the contract. But if he demands an estimate, and because he does not get it he abandons the contract and later on brings suit on the contract, he must come prepared to show that he was justified in abandoning it; the justification being that he was entitled to his estimate, and it was refused him."

The contract provided upon the subject of partial payments as the work progressed:

"Estimates for partial payments will be made by the engineer, upon a request of the contractor, if made prior to Saturday of any week; twenty-five per cent. will be retained therefrom until completion of the work."

Under this provision of the contract, plaintiff had received from the engineer 15 different estimates as the work progressed. While he complains these were made on a wrong basis, too small, and unfair to him, because they were based on a prorating of the percentage over the entire cost or contract price of the system, and not on the relative value of the work actually done, he states that he submitted to it so long as he was financially able to continue the work, as under the contract he would have just that much more coming to him when the contract was completed, but that, when he asked for the estimate, a refusal of which compelled him to cease operations, not only were his previous estimates too small under the contract, but from three to four weeks' work had been done since his last estimate, during which time he had built a receiving chamber and 250 feet of the trunk sewer, only 32 feet of which contained the red brick objected to, and there was due him for such work, most of which was not objected to, about $2,000.

While plaintiff has numerous complaints of unfair

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treatment, in violation of the contract, his ultimate grievance which culminated in his ceasing work is, not that he was unjustly forbidden to use brick which fully complied with the specifications, for he testified that he did not stop work for such reason, but that defendant breached the contract by the refusal of an estimate and payment to which he was entitled and so crippled him financially that he did not have the requisite funds and could not continue. His own testimony confines him to this as the test question in the case and we think defendant is equally limited to such issue by its motion for a directed verdict based on plaintiff's undisputed evidence.

Irrespective of their previous differences, work in performance of the contract progressed, and payments were made from time to time on the engineer's estimates, with no indication that either party contemplated terminating it because of a breach by the other until the difficulty arose over the use of the red brick, and then the work continued for a time, and more of the sewer was constructed with brick approved by the engineer. Plaintiff thereafter was apparently doing the work in a manner and with material satisfactory to the inspector and proposed to continue if he could secure the payment he claimed was due him. He quit because unsuccessful in that particular, and defendant demanded in writing that he should continue.

The question on this record, therefore, is whether plaintiff, by his evidence, has *prima facie* established his right to discontinue work and bring this action for breach of contract, for the reason that defendant's inspector refused to give him an estimate, and defendant refused him a payment to which he was entitled.

No question is raised as to tile laterals to be constructed under the contract. Of the large, egg-shaped trunk sewer plaintiff constructed about 3,000 feet,

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and the break between the parties arose over the use of the forbidden red brick in 32 feet of this construction. All the brick used was furnished by Clippert & Spaulding, a local firm of brickmakers. They manufactured both a white and red sand brick and a cheaper clay or mud brick. Their white sand brick had been in use for construction of sewers in Lansing for about 12 years, and was mostly used on this contract. At the time plaintiff used the red sand brick Clippert & Spaulding were unable to furnish the white. Plaintiff claims, and testified, that the red brick complied fully with the specifications, were equally good and more expensive than the white, costing from $1 to $2 a thousand more, that the cheaper mud brick, which the engineer later authorized him to use, were laid in the sewer, and connected to the red, so as to form one continuous construction, in the presence of the engineer.

The specifications in the contract relative to brick were as follows:

"All brick used in the work must be sound, hard, and thoroughly burned through, clean and free from lime. None but whole brick are to be used except by permission of the engineer. All brick must be thoroughly soaked in water before being used. All brick which break under this test must be rejected. If required by the engineer, the contractor must provide a suitable tank in which to soak the brick for a period of twelve hours. All brick must be well wet immediately before being used in dry, hot weather."

It is plaintiff's testimony that the red brick as laid fully complied with all these requirements. George Clippert, who had been engaged in manufacturing brick for over 40 years, and was a member of the firm which made these, testified that the red brick fully complied with the specifications in every particular; that they were as good as the white for sewer purposes; that the clay for their manufacture came from the same bed; that they were mixed the same, put

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through the same machines, and burned in the same kilns, but some burned red and some white, the latter predominating; that the red, on account of their more attractive color, were more desirable for facing brick, and brought a better price; that they were otherwise practically the same and equally durable as the white. Of the reason for delivering plaintiff the red brick, he says:

"Why, I ran out of the white ones, and I had some of them red ones on hand, and I delivered them, even though these brick were more expensive than the others; that was nothing to me. I would not stop my work on account of the brick, not when I had any brick of any kind."

Spaulding, the other member of the firm, testifying to the same effect, said:

"The reason why they are called sand brick is you have to mix them with sand to make them, for if we do not they would crack, if they are not strong. We have some clay that burns red and some that burns white. We have to mix the sand with both of them; other than the color they are the same brick, only the difference in the color. The clay with the white are made out of magnesia, and the red has more iron substance in it."

The written notice given plaintiff by the engineer to replace the red brick, in default of which an estimate would be refused, required that he replace the same "according to the specifications for the construction of said sewer," thus directly referring his demand to such specifications, and implying that in his judgment they did not comply therewith. This necessarily raised a question of fact, unless the decision of the engineer was final and conclusive. The court held that under the terms of the contract it was, unless plaintiff showed the inspector acted dishonestly and in bad faith, saying:

"Under this contract he could not use any material unless it was approved by the engineer or the inspec-

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tor. I do not understand, however, that that would require the engineer to be there and pass upon each particular item of material going into the work. If the engineer was about and made no objection to material that was visible and being used, then it could be treated as approved. But when the engineer told the plaintiff that he must not use the red sand brick, then the red sand brick had not only not had his approval but his express rejection, and it was the duty of the plaintiff to immediately cease using them, because he had contracted that he would not use material except as it had been approved by the engineer."

The then charter of defendant provided that the city engineer should "have the supervision and charge of the construction and repair of all sewers and drains whenever and wherever ordered by the common council." In harmony with this provision the form of contract for sewer work previously adopted by the common council and used in this case designated him as inspector to have charge of and supervise the contemplated construction. As its official and employee he was defendant's agent and representative in protecting its interests and seeing that the work was performed in compliance with the contract. This, however, would not preclude the contracting parties from agreeing that he should also be the arbitrator between them and his decision final in any matter in difference. If they did so agree, his determination would be conclusive and binding between them, to the exclusion of any appeal to the courts, unless he acted in bad faith and fraudulently.

On the subject of inspection this contract provides that:

"Whenever the word 'inspector' is used in these specifications it is understood to refer to the city engineer or, in his absence, such special inspector as may be appointed by the council or engineer for the purpose of supervising the work."

A special inspector was appointed by the engineer

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and inspected the work under his supervision. The most stringent provisions in the contract as to inspection, and those upon which defendant relies, are:

"All materials of whatever nature required in the work are to be furnished by the contractor, and must be approved by the engineer before being used, and the contractor must furnish full facilities for such tests as may be required. * * *

"All work to be done in a neat, substantial, and workmanlike manner, to the satisfaction of the common council, under the direction of the engineer, whose orders are to be obeyed in all matters pertaining to workmanship or materials, subject to these specifications."

The contract nowhere provides in exact words that the engineer or inspector shall be an arbitrator, or that his decision shall be final, in the clear and concise language commonly found in contracts construed as appointing an arbitrator. It is well settled that the contracting parties may agree to the arbitrament of even an interested party, if they see fit, and when they do so with full knowledge they must abide the result, in the absence of fraud; but there must be no room to doubt that such was the intention of the parties. The agreement must be express, not implied. *Central Trust Co.* v. *Railway Co.* (C. C.), 70 Fed. 282; *Mercantile Trust Co.* v. *Hensey,* 205 U. S. 298 (27 Sup. Ct. 535, 10 Am. & Eng. Ann. Cas. 572). In *Lamson* v. *City of Marshall,* 133 Mich. 250 (95 N. W. 78), relied upon in this case as authority for directing a verdict, the contract under consideration provided:

"In case of misunderstanding of the meaning of such plans, specifications, and contract, or any of them, the engineer's interpretation shall be taken as final."

Equally clear and conclusive language appears in the contracts construed in *Hanley* v. *Walker,* 79 Mich. 607 (45 N. W. 57, 8 L. R. A. 207); *Guthat* v. *Gow,*

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95 Mich. 527 (55 N. W. 442); *Moran* v. *Schmitt*, 109 Mich. 282 (67 N. W. 323); *Kelley* v. *Public Schools of Muskegon*, 110 Mich. 529 (68 N. W. 282).

While this contract confers upon defendant and its engineer strong controlling authority over the construction during its progress, in the particulars that material furnished by the contractor must be approved by the engineer before being used, and the work must be done to the satisfaction of the common council, under direction of the engineer, whose orders are to be obeyed, the requirements of the contract are yet made the final test by the provision that such matters are "subject to these specifications." This is emphasized in behalf of defendant by the further provision that:

"Any direction in relation to the work that may be given by said inspector in contravention to the provisions of the plans or specifications shall in no wise be binding upon the city."

While the work is required to be to the satisfaction of the common council, this is not of that class of satisfaction contracts involving the personal sentiment, taste, or sensibility of the party to be satisfied, in which case his expression of satisfaction or dissatisfaction cannot be questioned, but involves, as in *Schliess* v. *City of Grand Rapids*, 131 Mich. 52 (90 N. W. 700), "gross considerations of operative fitness and mechanical utility which are capable of being seen and appreciated by others," where compliance with the requirements of the contract is held to import satisfaction.

The proposition is urged in behalf of defendant that:

"It makes no difference in what capacity the city engineer acted, whether as an arbitrator between the parties, or as a supervising agent for the city; the agreement was that the brick should, before being

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used, be passed upon by the city engineer and approved by him. It would be unreasonable to suppose that the contractor had the right to furnish such brick as he saw fit to use, place it in the sewer against the objection of the city engineer, go forward with the work and construct a large sewer and cover it up, and then try out the question as to whether the brick were good and complied with the specifications in a lawsuit afterwards, when it would be impossible to determine from examination whether such was the case."

As a general proposition this contention, as stated, presents a reasonable rule of construction, but applied to the facts of this case, disclosed by the thus far undisputed testimony, it becomes of less force.

It is plaintiff's claim that the brick in dispute not only complied with all specifications of the contract, but that in effect they had been passed upon and approved by the engineer, inasmuch as they were shown by the testimony to be of the same quality, from the same clay bed, made by the same parties, in the same manner, and with the same machines as that previously approved and used in the construction; the only difference being the color, in relation to which the contract contained no requirement. Plaintiff's testimony also showed that it was yet possible to determine from examination whether they were good and complied with the specifications, there being no difficulty in traversing the interior of this large, egg-shaped sewer and making a thorough inspection and comparison of all its parts, and that this had been done, with an acetylene lamp, prior to the trial; that most of the red brick which he was directed to replace had been laid before the engineer ordered him not to use them; and that after such order, and before the clay brick he was authorized to use came, he had laid only from 500 to 700 red brick, and then under the engineer's orders proceeded with the clay brick.

Plaintiff's evidence also shows that the value of the work done subsequent to the last estimate, exclusive

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of the red brick ordered replaced, amounted to approximately $1,600, and that to replace the red brick would cost about $200.

It is admitted by plaintiff that he laid some red brick after the engineer told him not to do so, and that he did not remove those he had laid when ordered to do so. On the strength of these admissions a verdict was directed for defendant under the theory that the decision of the inspector was conclusive, and in disregarding it plaintiff breached the contract.

There is no language of finality in the contract which in our view makes the decision of the inspector an arbitrator between the parties to the extent that his decision is binding and conclusive to the exclusion of an appeal to the courts for an adjudication of whether the material furnished by plaintiff in truth complied with the specifications. For the time being, while the work was in progress, the engineer was vested with authority to judge, direct, and reject, to compel faithful performance, and, as suggested by the trial court, to refuse an estimate upon the city to pay for something he had rejected. While he had rejected this 32 feet of red brick sewer, he had not rejected the other $1,600 worth of work done since the last estimate. The notice he gave plaintiff stated, "No estimate for work done will be given you until same is replaced according to specifications for the construction of said sewer." What portion of the work done was not in accordance with specifications or in what particular is not stated. It does appear that no answer was given to inquiries upon the subject, and all estimates were cut off, but the work ordered continued.

It also appears that both parties thereafter recognized the contract as in force, and construction of the sewer was continued by plaintiff beyond the red brick, over which the difference had arisen, under direction and inspection of the engineer, with work and ma-

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terial to which no objection was made; operations only being suspended when lack of funds, owing to refusal of estimates for work performed, rendered continuance impossible. Under the contract 25 per cent. was retained on all work until its final completion and acceptance by the council, and plaintiff's bond for faithful performance required him "to keep the whole work in perfect repair for a period of twelve months from its acceptance by the council as completed."

In the case of *Montgomery* v. *Mayor*, 151 N. Y. 249 (45 N. E. 550), under a contract for construction of a sewer providing for the appointment of an inspector by the park commissioners to see that the material furnished corresponded with the plans and specifications, whose certificate approved by the engineer was a condition precedent to payment, the court said, as can be said here, that the effect of the contract was to vest in the inspector a right or capacity to pass upon the performance of the work "which came very near to constituting him, as between the parties, the judge as to that matter," and further said:

"For all that the case discloses, there was nothing to prevent the plaintiffs going on with the work and relying upon their ability to prove, if upon completion the city should refuse to make payment, that the work and materials were up to the requirements of their contract."

In *Gearty* v. *Mayor*, 171 N. Y. 61 (63 N. E. 804), under a contract and contentions analogous in many respects to the instant case, touching the rights of the parties and the course to be pursued, the court said:

"We thus have a situation where each party charges the other with breach of the contract. The city insists that the work was improperly done, and the contractor urges that the commissioners are arbitrarily or improperly exercising the powers vested in them by the contract. Questions of fact and law are thus presented, which can only be determined by a trial.

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"It is very clear that the plaintiff could have stopped work as ordered by the engineer of construction and stood upon his contention that the work had been properly done, brought his action to recover for labor and materials performed and furnished under the contract, and claimed his prospective profits. *Smith* v. *Wetmore,* 167 N. Y. 234 [60 N. E. 419]; *Roehm* v. *Horst,* 178 U. S. 1 [20 Sup. Ct. 780]. * * * The fact that this work was to be performed to the satisfaction of the commissioners and their engineer of construction is not conclusive against the plaintiff. That power cannot be exercised in an arbitrary manner, but reasonably and in accordance with fairness and good faith.

"This court has frequently held that under such a provision, that which the law will say a contracting party ought in reason to be satisfied with, that it will say he is satisfied with."

Many of plaintiff's assignments of error relate to adverse rulings on the admission of testimony offered, made upon the theory that the inspector was a final arbitrator whose decisions were conclusive and could not be questioned. In view of what has already been said, we think those questions, as now presented, are not likely to arise on a retrial of the case, and therefore need not be reviewed in detail.

We conclude, from the copious record before us, that this is a case which, on a full trial, inevitably involves, not only interesting questions of law, but numerous and serious issues of fact for a jury, that plaintiff's evidence *prima facie* established his right to an estimate, at least for some amount, on work which had not been questioned, and therefore his right, on refusal of payment, to bring this action for breach of contract; therefore defendant's motion, at the conclusion of plaintiff's testimony, for a directed verdict in its favor, should have been denied.

The judgment is reversed, and a new trial granted.

McALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

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In re QUINN'S ESTATE.

McCARTNEY *v.* SAUL.

1. TRIAL—JURY—ENTERTAINMENT OF JUROR BY ATTORNEY—PREJUDICIAL ERROR—ATTORNEY AND CLIENT—MISCONDUCT.

Where one of the jurors at the trial of a hotly contested will case was entertained at the house of the attorney for the prevailing party on Thanksgiving day, during the progress of the trial, among the members of a club which had been invited before the trial, and the attorney subsequently retired from participation in the case, but acted as a witness, and the court had warned the jurors not to talk with the parties or their attorneys, it was erroneous to deny proponent's motion for a new trial on the ground of prejudicial influence.

2. SAME—NEW TRIAL—GROUNDS.

Without reference to the question of the correctness of the verdict, a new trial will, in most cases, be ordered, where a juror has been fed or entertained by the successful party or his counsel during the progress of the trial.[1]

3. EVIDENCE—WITNESSES—ATTORNEYS—CROSS-EXAMINATION.

On the trial of a contest over decedent's will, which contestants claimed was void for incompetency of the testatrix, an attorney for the contestants who had given testimony tending to show the mental and physical condition of the testatrix at times when he called upon her in relation to a certain proposed compromise of pending or threatened litigation, should have been permitted to answer, on cross-examination, what was his purpose in making the visit and whether he was there at another time.

4. WILLS—EVIDENCE—EXTENT OF CROSS-EXAMINATION.

In the trial of a contested will case it was improper to exclude cross-examination of the attorney for contestants which was offered to show decedent's motive for changing her will to the disadvantage of the contestants, because they threatened to commence certain litigation.

[1] On the question of treating jurors as ground for new trial, see note in 19 L. R. A. (N. S.) 733.

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Error to Shiawassee; Miner, J. Submitted January 27, 1914. (Docket No. 89.) Decided June 1, 1914.

Margaret McCartney and others presented for probate the will of Bridget Quinn, deceased, which was admitted to probate in the probate court and contestant Margaret Saul appealed to the circuit court. Judgment for contestants and proponents bring error. Reversed.

Neil R. Walsh and *Edwin H. Lyon,* for appellants.

A. L. Chandler and *George E. Pardee (John T. McCurdy,* of counsel), for appellees.

STEERE, J. The writ of error herein brings before the court for review proceedings had in the circuit court of Shiawassee county in contesting the validity of the will of Bridget Quinn, who died in the city of Owosso November 28, 1911, at the age of 84 years, leaving an instrument as her last will and testament, executed November 16, 1911. Said instrument was duly probated in the probate court for Shiawassee county, and contestant Margaret Saul, a sister of deceased, appealed to the circuit court, where trial by jury was had resulting in verdict and judgment sustaining her contention and adjudicating said instrument invalid. The validity of said instrument was contested on the grounds that, at the time of its execution, deceased was "mentally incompetent to make the will, and was unduly influenced and coerced to sign (if she did so sign) said alleged will."

The amount of deceased's estate is not definitely disclosed, but sufficient appears in the record to indicate it was of considerable proportions and adequate to develop a bitter and exhausting contest over it amongst her numerous surviving relatives. By the terms of the instrument in controversy, which contained 14 bequests and devises, she gave an adopted

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son named W. W. Quinn, of Battle Creek, certain real estate in Owosso; to two nieces, Mrs. McCartney and Mrs. Cunningham, certain real estate in Owosso, with a proviso that the latter, upon payment to her of $1,000, should deed her interest therein to the former, and to the same parties also other described real estate with her household effects; to a young woman, Esther Lyke, who had lived with her many years, $200; to two of her nephews, and her four brothers and sisters, including said contestant Margaret Saul, $5 each; $30 for five low masses for certain named relatives; and the balance of her estate in trust to Frank McCartney, husband of a niece, to be used for the benefit of the Catholic schools of Owosso. She had made two previous wills of similar import, but designating different executors; the second will having been executed May 20, 1911, about six months prior to the one in question.

The scrivener, a reputable attorney of Owosso, who drafted those wills and also the one in question, testified that he had no knowledge of what property she owned, or of the relatives whom she made objects of her charity, other than that shown by the wills; that he received suggestions for their contents only from her, and the occasion of the last one was her desire to make some changes relative to disposition of the residue of her estate and the amount given to certain beneficiaries, one of which was a reduction of the bequest to Margaret Saul, the contestant. Said attorney, who was later one of the attorneys for proponents, and deceased's family physician were the subscribing witnesses, and both testified that, at the time of the execution of her will on November 16, 1911, her mental condition was good; that in their opinion she was capable of understanding the provisions of the will, knew what property she possessed and who were the objects of her bounty. Various relatives and other witnesses also testified that she

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was then possessed of all her faculties, of good understanding, bright, and mentally sound.

To the contrary it was claimed, and testimony was produced tending to show, that she was then hopelessly of weak and unsound mind, childish, forgetful, possessed of hallucinations, incoherent in her talk, and often during that summer and fall lapsed into a comatose condition from which it was difficult to arouse her, and that she was mentally incapable of understanding or executing the instrument in question, or any other matter of importance and was hopelessly stricken with arterio sclerosis, which an expert, of 13 years' general practice of medicine, defines as a hardening of the arteries, usually expected to be found in people above 60 years of age, progressive in its nature, and by reason of which, in his opinion, the average person of 70 years of age would be partially incompetent to make a will, and would require some assistance "to get it clear, concise, and make it legal" (although a less degree of mental capacity is requisite for the execution of a will than for making a contract). Upon this paramount issue of deceased's mental capacity when the instrument in question was executed, as well as that of undue influence exerted over her by certain relatives, a volume of testimony of wide scope was introduced, professional and non-professional, covering her life habits and history, ranging through her likes and dislikes, pursuits, associations, quarrels, language, appearance, and state of health, as well as her mental and physical condition at or about the time of executing the contested will. For the present disposition of this case it is not deemed essential to consider this voluminous testimony at length upon all the many questions raised by the numerous alleged errors assigned by appellants.

When trial of this case was entered upon, after the jury was selected and sworn, the court, in the presence of counsel, very properly took pains to instruct

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the jury in a preliminary way as to their duties and deportment during the progress of the trial, cautioning them to avoid any conduct which might possibly give rise to suspicion of outside influence, saying, amongst other things:

"This is a case of interest to both parties, and both parties have a right to a fair and impartial verdict at your hands, and so, in order to accomplish that, I desire you to be careful and not talk with any one, witnesses or attorneys, who have anything to do with this case," etc.

Under this very proper rule of conduct, so clearly stated, and in view of the rather unusual and delicate situation which presented itself in the particular that three of the attorneys in the case were also important witnesses, one for proponents and two for contestant, testifying positively and at length in favor of their respective clients upon the controlling issue of deceased's mental competency, we are impressed that the following circumstance of familiar intercourse in violation of the mandate of the court should not be lightly disregarded. It was shown that a juror who sat in the case was, during the progress of the trial, entertained at the home of one of the witnesses and attorney of record for the successful litigant, inadvertently and innocently it is claimed, and may be conceded, but nevertheless an undisputed fact. This was learned by appellant's counsel after the trial was concluded and presented to the court by affidavits, as one of the grounds of a motion for a new trial. Counter affidavits were filed, not denying the essential facts as above stated, but in explanation and extenuation of them. This case was tried in November, and, while it was in progress, Thanksgiving day intervened. On that day the attorney and his wife entertained at their home and served refreshments to the members of the Maple River Farmers' Club. The juror in question, not a member of that club but of a

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kindred organization, was present on that occasion and partook of the hospitalities. It is stated in the counter showing that he was there by reason of an invitation extended to him and his wife, before commencement of the trial in question, in connection with other members of the kindred club to which the juror belonged, the invitation not having been participated in or known to the attorney; that the trial was not mentioned or in the minds of either of the parties, and no special attention or favors were shown the juror beyond the usual courtesies of hospitality extended to all present; that the attorney, though his firm was of record as attorneys in the case for contestant, had no interest in the result, had withdrawn from participation in the trial, owing to his being a witness, and had when on the witness stand so stated; that the whole transaction complained of was a mere innocent incident of ordinary hospitality which had its inception before it was known the guest might be a juror in the case, devoid of suspicious circumstances, was not designed to, could not, and did not, exert the slightest influence on the juror, who was a reputable farmer of strict integrity, nor bias him in performing his duties as a juror. It is also shown, and urged by appellants as directly prejudicial, that on the occasion of this social function, in a general discussion of the welfare of the Maple River Club, the attorney emphasized his kindly disposition towards such organizations by stating that, if the club felt too poor to pay the State dues of 20 cents per family, he would pay them while he lived, and arrange in his will for them to be paid as long as the club existed, and, in response to an expression by the juror or "wonder" if he would make such a promise to his club, made some facetious reply indicating a friendly inclination, hampered by the results of a recent campaign. It is urged that "no man, be he ever so honest, could feel otherwise than touched by the munificent

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offer" to pay the dues for those who were or felt too poor to pay them and to perpetuate such payments by will after the donor had joined the silent majority, followed by expressions of regret that his limit of financial resources only prevented extending the aid to other kindred organizations.

It was the opinion of the trial court that sufficient facts were not shown to demand granting a new trial, referring to the high character and integrity of the parties involved, and the fact that, after the selection of a jury, the attorney withdrew and took no further part in the trial of the case except as a witness.

Conceding that the juror knew or believed that the attorney had retired as such from the case and was not interested in the result, he yet knew that the attorney was a witness and that the court had emphatically instructed the jurors not to even "converse with any one connected with the trial of the case," saying, "That means the witnesses, the parties, and the attorneys."

It is undisputed that the juror violated the plain and positive instructions of the court, thus giving occasion for the imputations which he was cautioned to avoid, and affording special opportunity for the exercise over him of improper influences, was either party so disposed. The gracious hospitality and pleasant entertainment extended on that occasion to the juror and other guests, by the host and hostess in their own home, with congenial conversation on a subject in which the juror was interested, disclosing on the part of the host a generosity and good will towards organizations with which the juror was affiliated, would naturally give rise to an especially kindly and fraternal feeling between them. Just to what extent the attorney was connected with the case is not the controlling question. He was an important witness. The record shows that he was present at the beginning of the trial, sat by and consulted with

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attorneys for contestant until half an hour after the jury was selected, and while on the witness stand testified on cross-examination that his firm was employed by contestant. The juror whom he helped select, and whom he entertained as an invited guest at his home during the progress of the trial, unknown to opposing counsel, participated in a verdict in this case supported by his testimony and favorable to his firm. On this question it is not necessary that it be shown a bad motive or intent existed in the conduct of counsel or juror, or that the impropriety complained of did in fact exert an influence resulting unfavorably to the party defeated.

As was said in *Solomon* v. *Loud,* 173 Mich. 233 (140 N. W. 651):

"The effect of the misconduct upon the determination of the particular case is not apparent. But when misconduct, calculated, if not intended, to have a generally pernicious effect upon legal proceedings, is traceable to the prevailing party in such proceedings, we are of opinion that reason appears for treating the trial as a mistrial and for setting aside the judgment."

In 2 Thompson on Trials, § 2564, it is said:

"Where a juror has been treated, fed, or entertained by the successful party, or his counsel, or at the expense of either, a new trial will, in nearly all cases, be granted. This rule is, by most courts, deemed indispensably necessary to preserve the integrity of juries. It being, as already stated, a rule of public policy, it will be enforced without reference to the question whether or not the verdict was right."

This general rule is further sustained and elaborated by apt language in *People* v. *Montague,* 71 Mich. 447 (39 N. W. 585); *Churchill* v. *Alpena Circuit Judge,* 56 Mich. 536 (23 N. W. 211); *People* v. *Hull,* 86 Mich. 449 (49 N. W. 288); *Cooper* v. *Carr,* 161 Mich. 405 (126 N. W. 468); *State* v. *Hartmann,* 46 Wis. 248 (50 N. W. 193); *Knight* v. *Inhabitants*

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of Freeport, 13 Mass. 218; *Commonwealth* v. *Roby*, 12 Pick. (Mass.) 496.

We are impelled to conclude that the conduct complained of, though perhaps inadvertent, is of such a nature as to require the application of that rule.

Another assignment of error calling for serious consideration is the refusal of the court to permit answers to certain questions asked in cross-examination of one of contestant's attorneys, who was also an important witness to facts bearing on deceased's mental competency. He testified to having visited deceased's home on three different occasions during the month the will in controversy is claimed to have been executed, at which times he saw but was unable to converse with her owing to her condition; that on the first occasion she was lying on a couch with her eyes closed, and Margaret McCartney, who was apparently in charge of the household, was unable to arouse her, although she took hold of and shook her, without any apparent effect; that on the two subsequent visits her physical and mental condition were apparently the same; that witness observed her lower jaw somewhat dropped, muscles of her face apparently relaxed, her complexion of extreme pallor, "and with every appearance of a person knowing nothing of her surroundings." Objection was sustained to the following questions asked by appellants' counsel:

"*Q.* At that time [referring to the second visit] you went there for the purpose, did you not, of making a demand for retraction of an alleged slander by Mrs. Quinn, and for the purpose of securing from her a money settlement?

"*Q.* Did you not go to the house of Bridget Quinn after this occasion that you talked with Dr. Willson, on business matters, in relation to a suit you proposed to start against Mrs. Quinn?"

The witness should have been permitted to answer these questions. The fact that witness visited her to

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negotiate in regard to an important business matter relating to a proposed lawsuit, and contemplated settlement involving a substantial sum of money, and having on the first visit ascertained her condition, as testified to, returned a second and third time on the same mission, was clearly competent as bearing on the weight of his testimony touching her mental condition.

The competency and bearing of this inquiry is more clearly disclosed, we think, in connection with a later ruling, refusing counsel permission to show by Margaret McCartney more fully what was said and done on the occasion of such visits. Counsel for proponents, after an adverse ruling, being permitted to state privately the purpose of the proposed testimony, said:

"We expect to show by this witness that Mr. Pardee, representing the McNamaras, called there and told the witness that he represented the McNamaras in a proposed slander suit, and that Mrs. Saul was their witness in that respect to prove the fact; that upon all of the visits he made there it was for the same purpose, and the facts communicated by Mr. Pardee to Mrs. McCartney were communicated by her to Mrs. Quinn, and it had the effect of showing her that Mrs. Saul was taking steps adverse to Mrs. Quinn desiring to collect the sum of $500 in said slander action, and therefore was made the basis for the change in the will which was subsequently made."

We think, under the circumstances disclosed, full latitude should have been given to the proposed line of cross-examination of the attorney, and that, as bearing upon deceased's mental attitude and reason for changing her will, the offered testimony of Mrs. McCartney was competent.

For the reasons stated, the judgment must be reversed, and a new trial granted.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

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SYLVESTER *v.* SYLVESTER.

DIVORCE—ANNULMENT—MARRIAGE.

Evidence of the complainant in divorce proceedings that his wife had been guilty of improper relations with other men prior to her marriage, met by her testimony that the complainant also had illicit relations with her, *held*, by an evenly divided court, to be insufficient to sustain the averments of the bill.

Appeal from Wayne; Mandell, J. Submitted October 14, 1913. (Docket No. 42.) Decided June 1, 1914.

Bill by Ernst Sylvester against Della Sylvester for divorce. From a decree dismissing bill and cross-bill, complainant appeals. Affirmed.

Louis H. Wolfe, for complainant.

Ralph S. Moore, for defendant.

BIRD, J. By this proceeding the complainant seeks to have his marriage with defendant annulled on the ground of her previous unchastity. The defendant answered the bill, and charged complainant with extreme cruelty, and prayed for affirmative relief. After hearing the testimony offered by the parties, the chancellor refused to grant relief to either, and accordingly dismissed both bill and cross-bill. From this decree complainant has appealed.

These parties were married in January, 1912, after an acquaintance of six months and a courtship of four months. After marriage they lived with complainant's parents in the city of Detroit for a time, and later they lived at a boarding house until they separated in August, 1912. At the time of marriage

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complainant was 23 and defendant 21 years of age. Complainant charges that he was induced to marry defendant by reason of her representations that she was a chaste girl; that before marriage he talked with her concerning her chastity, and she assured him that she had never indulged in sexual intercourse. He gives as a reason for his great concern in this regard that the Lutheran Church, to which they belonged, lays great stress on the chastity of women. He asserts that he married defendant believing and relying upon these representations, and that they lived happily for about four months, when he began to hear rumors of her previous unchastity; that an investigation convinced him of the truth of them, and he at once left her, and has neither lived nor cohabited with her since. Upon the hearing three witnesses testified that defendant was pregnant and suffered a miscarriage in February, 1911. One of these witnesses was a nurse who attended her on that occasion. It was further shown that defendant had sexual intercourse on several occasions in the month of October, 1910, with a young man whose name was given upon the hearing. Defendant afterward testified in her own behalf, but she made no denial of these charges; therefore, it is fair to assume that they are true. Defendant admitted in her answer and also in her testimony that she suffered a miscarriage about a month after she was married, but she testified that complainant was responsible for her condition, as he was intimate with her previous to their marriage. It having been established without contradiction that defendant was sexually intimate with another in October, 1910, that she gave birth to twins 11 months before marriage, and it having been established by her own admission that she was pregnant at the time of marriage, we think a case was made entitling complainant to relief. *Harrison* v. *Harrison*, 94 Mich.

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559 (54 N. W. 275, 34 Am. St. Rep. 364). It is true, as argued, that if complainant was sexually intimate with defendant before marriage, he is not entitled to the relief sought. He denies, however, that he had any such relations with her before marriage, and his denial is given credence by the admitted conduct of defendant with others before marriage. The burden of proof upon this question rested with her (*Thomas* v. *Thomas*, 19 Neb. 81 [27 N. W. 84]) and conceding that her testimony is entitled to equal weight with his, she has failed to discharge that burden.

Defendant's showing fell short of making a case of extreme cruelty against complainant. She testified to a few instances of personal violence and to one occasion when he threatened to kill her. Her testimony in this regard lacks corroboration, except in a single instance, and is denied by complainant. Defendant's charges that complainant made love to their landlady are denied by them. Both complainant and defendant agree that they lived happily together until the last month or six weeks before they separated, and a reading of the record leads to the conclusion that whatever there was in his treatment of her which merited criticism occurred in the last six weeks they were together, and was due to quarrels growing out of her deception as to her past life.

It is also contended by defendant that the allegations of the bill are insufficient to admit of proof that defendant was pregnant at the time of the marriage. The amendment to the bill, allowed upon the application of complainant at the hearing, fully meets this objection.

The decree should be reversed, and one be entered annulling the marriage; neither party to recover costs.

BROOKE, STEERE, and MOORE, JJ., concurred with BIRD, J.

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OSTRANDER, J. The complainant seeks a decree annulling his marriage with defendant, which took place January 11, 1912. They ceased cohabitation in August, 1912, and the bill was filed September 17, 1912. It is established, I think, that prior to her marriage the defendant had illicit sexual relations with some man or men in October, 1910, and that as a result there was a miscarriage in February, 1911. The serious question is whether complainant had not such relations with her before their marriage. In her answer she tenders such an issue, charging upon oath that while they were engaged to be married complainant had sexual intercourse with her, which resulted in a miscarriage after they were married. This issue she maintains with her testimony, stating that, discovering her condition, she wrote to him and took the matter up with his father and mother, who insisted they be married. After marriage they lived with complainant's father and mother for some time, and about a month after the marriage she suffered a miscarriage. A doctor attended her. When asked if defendant had a miscarriage after their marriage complainant answered, "I don't recollect." The father and mother of complainant were not called as witnesses. Assuming that the testimony of each of the parties is apparently entitled to equal credence, I am of opinion that the testimony of defendant must be held to preponderate, for the reason that no attempt was made to disprove her statements by calling either of the parents of complainant, or by excusing the calling of them, and by the further fact that complainant does not deny that defendant suffered a miscarriage after marriage as she says she did. The testimony of defendant is specific, and affords the opportunity for its complete refutation by other witnesses, namely, the father and mother of complainant and the physician who attended her. It is met by complainant's denial of the antenuptial intimacy.

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The circuit judge had the advantage, not an inconsiderable one in such a case, of seeing the parties, and the relief asked for by complainant was refused.

For these reasons I feel compelled to disagree with my Brother BIRD, and to hold that the decree of the court below should be affirmed, with costs to defendant.

MCALVAY, C. J., and KUHN and STONE, JJ., concurred with OSTRANDER, J.

MEYER *v.* MICHIGAN CENTRAL RAILROAD CO.

CARRIERS—SNOW AND ICE—NEGLIGENCE—RAILWAYS.

While it is the duty of a railroad company to provide safe platforms, free from snow and ice, if reasonable opportunity to remove it occurs, there is no obligation requiring such carriers to keep the platforms of its cars entirely free from snow during bad, stormy weather, or to remove the accumulated snow at every station; and a passenger who was injured in passing from one car to another by slipping on accumulated snow, soon after leaving a main station and before arrival at a point where the work of clearing the cars was usually performed, the weather having been snowy and stormy, could not recover against the carrier.[1]

Error to Berrien; Coolidge, J. Submitted June 10, 1913. (Docket No. 62.) Decided June 1, 1914.

[1] On the question of the duty of a carrier to keep steps of cars free from snow and ice, see notes in 15 L. R. A. (N. S.) 523 and 35 L. R. A. (N. S.) 592.

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Case by Herman Meyer against the Michigan Central Railroad Company for personal injuries. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

T. Fred Laramie (Cady & Andrews, of counsel), for appellant.

Gore & Harvey (Henry Russel and *Frank E. Robson,* of counsel), for appellee.

BIRD, J. On December 25, 1909, plaintiff, who was a resident of Chicago, took passage on one of defendant's local trains at 3:15 in the afternoon to come to Three Oaks, in this State. He sat in the smoking car until the train was within about two miles of his destination, when he got up and started for the coach in the rear, while the train was running at the rate of 40 miles an hour. When he got upon the platform there was a "lurch or jerk" of the train, and he slipped and fell to the ground, thereby sustaining serious and permanent injuries. The negligence which he relies on was the failure of defendant to keep the platforms free from snow and ice. After plaintiff had made his case, the trial court directed a verdict for the defendant on the ground that no negligence was shown on the part of the defendant. The question before us is whether this was a proper direction.

It appears that, when the train left Chicago, the platforms and steps of the cars were free from snow and ice. There had been a heavy snowfall during the day and it was yet snowing when the train left Chicago. The snow ceased falling at about 4 o'clock, but it continued to blow and drift for some time after that hour. The testimony shows that at Michigan City (a station 17 miles west of Three Oaks), where the train arrived at about 5:05, there was snow on the platforms, and here and there were lumps of

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packed snow which had evidently been deposited there by the feet of oncoming passengers, and which had made the platform and steps more or less slippery. We are asked under this state of facts to say that the testimony was sufficient to submit to a jury upon the question of defendant's negligence.

This request raises the question as to whether the defendant neglected any duty which it owed to plaintiff in keeping its car platforms free from snow and ice. By reason of the varying conditions under which this duty has been considered and applied in the adjudicated cases, they are not very helpful in the solution of this one. We think it is a matter of common knowledge that when passenger trains are operated in midwinter and during snowstorms and while the snow is blowing and drifting, more or less snow will collect on the platforms and steps. To hold that the platforms and steps are to be freed from snow and ice at each station, or before a passenger is allowed to pass over them, would be to impose an unreasonable rule, and one which would make it extremely difficult to operate trains in the winter season. The testimony shows that the snowfall had been very heavy that day, and, while it had abated at about 4 o'clock, it was still blowing and drifting when the plaintiff went upon the platform. The testimony fails to disclose that the conditions were other or different on the platforms than they ordinarily are during a snowstorm, or that the accumulation of snow was greater. In the absence of unusual conditions, created by snow and ice on car platforms, we think there is no rule which would compel those operating the cars to see that they are entirely free from snow and ice until the storm is over and reasonable opportunity is had to remove them at places where such work is usually done. *Palmer* v. *Pennsylvania Co.*, 111 N. Y. 488 (18 N. E. 859, 2 L. R. A. 252).

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In the foregoing case, where a like question was dealt with, it was said:

"The immediate and continuous removal of all snow and ice from such trains, or the covering of them with sand or ashes in such manner that no slippery places shall be at any time exposed, would be quite impracticable and beyond the duty which a railroad company owes to its passengers. The presence of snow or ice upon exposed places on moving cars is an accident of the hour, and no ordinary diligence could, during the prevalence of a storm, wholly remove its effects from the places exposed to its action, so as to prevent accidents to heedless and inattentive travelers. A passenger on a railroad train has no right to assume that the effects of a continuous storm of snow, sleet, rain, or hail will be immediately and effectually removed from the exposed platform of the car while making its passage between stations, or the termini of its route, and it would be an obligation beyond a reasonable expectation of performance to require a railroad corporation to do so."

See, also, *Dorrance* v. *Railway Co.*, 175 Mich. 198 (141 N. W. 697).

We are of the opinion that the conclusion which the trial court reached was a proper one; and the judgment will be affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

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HEETHUIS *v.* KERR.

1. TAXATION — REDEMPTION — NOTICE — PERSONS ENTITLED TO BE NOTIFIED.

The purchaser of a tax interest in real property whose deed has not been placed on record, is not entitled to notice under the statutory provisions for redemption of Act No. 229, Pub. Acts 1897, as amended by Act No. 142, Pub. Acts 1905 (1 How. Stat. [2d Ed.] §§ 1911-1914), to cut off his right of redemption from a subsequent purchase of lands delinquent for taxes.

2. SAME—NOTICE TO REDEEM.

The fact that a purchaser of such tax title served a defective notice on the persons who were entitled to be notified would not entitle the holder of an unrecorded tax deed, who was not in possession of the premises conveyed, to redeem: he could not complain of any defects in the notice served on the owners of record.

BIRD and KUHN, JJ., dissenting.

Appeal from Muskegon; Sullivan, J. Submitted April 21, 1913. (Docket No. 105.) Decided June 1, 1914. Rehearing denied July 25, 1914.

Bill by Jacob Heethuis against William F. Kerr, Antha D. Keys and others to quiet title to real property. From a decree for complainant, defendant Keys appeals. Affirmed.

Cross, Vanderwerp, Foote & Ross, for complainant.

F. E. De Camp (Albert De Camp, of counsel), for defendant Keys.

OSTRANDER, J. Complainant has acquired the title of the State to certain premises in tax proceedings. The title which the State held is not, and apparently cannot be, successfully attacked by any one. Complainant undertook to give, and did give, to all per-

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sons entitled thereto, personally or by publication, notice of his having acquired the title and of the sum necessary to be paid to secure a conveyance from him. No one who was entitled to the notice is complaining about it. The appellant, who was not one of the class entitled to notice, who was not in possession of the land, but who asserted an interest in the premises, an interest cut off by the State's title, was made a party defendant by complainant's bill to quiet his title. She complains that the notice complainant gave was in various respects informal and not in compliance with governing law. The assignments of the failures to comply with the law in giving notice are several and raise various questions besides the one discussed in the opinion of Mr. Justice BIRD. I am of opinion that appellant cannot take advantage of any infirmities in the method of giving the notices. The case is not like *White* v. *Shaw*, 150 Mich. 270 (114 N. W. 210), in which a cotenant entitled to notice was permitted to assert failure to serve a notice upon his cotenant's executor, who was also entitled to notice. It was held that the tax title owner cannot proceed by piecemeal to cut off the right of redemption of each part owner, and that, until he had served notice upon all who were entitled thereto, the right to redeem continued in all. In the case at bar, as has been pointed out, the appellant was not one of the class entitled to notice, nor a cotenant with any one entitled to notice. If it is held that complainant is unlawfully in possession of the land, must again give notice and accept a sum certain for a reconveyance, appellant may be greatly benefited, and the complainant greatly injured. It appears that appellant's title is evidenced by tax deeds for taxes for the years 1901 and 1902. Complainant acquired the title for taxes for the year 1903. Appellant did not record her deeds. Complainant, since acquiring his title, has paid taxes, has built two houses on the premises, and made other improvements. The ap-

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pellant December 23, 1911, deposited with the register in chancery of Muskegon county $96.21 to obtain a reconveyance from complainant. Of this fact the register notified the complainant. The bill in this cause was filed January 4, 1912. It is therefore apparent that no equitable considerations favor appellant.

The decree will be affirmed.

MCALVAY, C. J., and BROOKE, STONE, MOORE, and STEERE, JJ., concurred with OSTRANDER, J.

BIRD, J. *(dissenting)*. In May, 1906, the complainant purchased lot 1, block 264, in the city of Muskegon, at a tax sale, for the delinquent taxes of 1903. He afterwards received a deed therefor from the auditor general, and gave the statutory notice to terminate the period of redemption to all of the defendants save appellant, whose tax deed was not at that time of record. He then filed this bill to quiet his title thereto.

The appellant contends that complainant is not entitled to the relief prayed, because the statutory notice served upon the other defendants was defective, and several defects therein are pointed out, chief of which is because the notice stated that they would be entitled to a reconveyance upon payment of the sum named therein, at any time within six months after the service of the notice, instead of any time within six months after the return of service of the notice. The notice prescribed by Act No. 229 of the Public Acts of 1897 provided that the owner and mortgagee of the premises should be advised as to the time in which they could redeem, as follows:

"That you are entitled to a reconveyance thereof at any time within six months after service upon you of this notice."

This part of the notice was later amended by Act No. 142 of the Public Acts of 1905, to read:

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"That you are entitled to a reconveyance thereof, at any time within six months after return of service of this notice."

The notice served upon defendant was in form a compliance with the law of 1897, although it was served after the amendment took effect, and we are now asked to hold that such notice is valid. Doubtless the effect intended by the amendment was to lengthen the time for redemption, as more or less time usually elapses after service and before return is made, but in fact it did not have that effect, as this court had already construed Act No. 229, holding that the period of limitation did not commence to run until the return was made and filed. *Pike* v. *Richardson*, 136 Mich. 414 (99 N. W. 398). We recognize, however, the importance of this notice to those interested in the title to real property, and it was evidently the intention of the legislature, not only that such persons should be advised, but correctly advised as to the time when their rights would expire by limitation. This is made manifest by the fact that the legislature itself prescribed the form of the notice to be given. The question is therefore presented whether we shall hold that the form of the notice prescribed by the Public Acts of 1897, aided by a construction thereof by this court, is equivalent to a notice in accordance with the amended form prescribed by the Public Acts of 1905. If we hold that it is, then a landowner could be served with a notice which would clearly mislead him as to the time in which he could redeem, unless he happened to have knowledge of the construction this court has placed thereon. We are of the opinion that the purpose of this legislation will be better conserved by holding that the form of the notice prescribed by the statute should be strictly followed, and that a failure in this respect will invalidate the notice. Having reached this conclusion, it

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The decree should be reversed, and the bill dismissed, with costs of this court to defendant. will be unnecessary to consider the other assignments of error.

KUHN, J., concurred with BIRD, J.

BEACH *v.* MICHIGAN CENTRAL RAILROAD CO.

MASTER AND SERVANT—DEATH—RAILROADS — PERSONAL INJURIES—NEGLIGENCE—CARRIERS—EVIDENCE.

Evidence, in an action for negligence resulting in the death of defendant's brakeman, *held*, insufficient to remove the cause from the field of conjecture as to the manner and cause of decedent's death.

Error to Wayne; Hosmer, J. Submitted January 21, 1914. (Docket No. 49.) Decided June 1, 1914.

Case by August Beach, administrator of the estate of Louis Beach, deceased, against the Michigan Central Railroad Company for the negligent killing of decedent. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Clarence P. Milligan and *Harry C. Milligan*, for appellant.

J. W. Dohany (Henry Russel and *Frank E. Robson*, of counsel), for appellee.

MOORE, J. Louis Beach, the plaintiff's decedent, was employed by the defendant as a freight brakeman, and was injured on the night of April 19, 1910,

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at Ypsilanti, dying at the Railroad Sanitarium at the city of Detroit, where he was taken a few hours after the accident, from the injuries received. The above suit was instituted by his father to recover damages. From a directed verdict in favor of defendant at the close of the testimony for plaintiff, the case is brought here by writ of error.

The claim of counsel for appellant is summarized as follows in the brief:

"There were no eyewitnesses to the accident. There was no contention that decedent was negligent in the case as it stood when verdict was directed. The law is settled that in the absence of eyewitnesses the deceased will be held to have been in the exercise of due care. See *Gilbert* v. *Ann Arbor Railroad*, 161 Mich. 73 [125 N. W. 745].

"On the question of the negligence of defendant we are confident in stating that we produced substantial proof, certainly more than a scintilla of evidence, which was unanswered in the slightest degree when verdict was directed. We offered testimony to show, *first*, decedent was on the top of the car braking the same in the line of his duty when last seen before the accident; *second*, that the other car was shunted down in a hurried, violent, and careless manner so that it struck his car with more than usual force and noise and drove it 1,000 feet to the derailer and off the track, with brakes partly on; *third*, that deceased was found immediately thereafter beside the track, not run over, but crushed and injured such as a fall from a car would do; *fourth*, that the circumstances were such as to cause the engineer of the freight to hurry with the work, *i. e.*, the necessity of clearing the line for the passenger train. Even if there was negligence proven on behalf of both under the act suit was brought, the question would still be one for the jury."

The trouble with this contention is that there is a dearth of facts disclosed by the record upon which to base it. It is shown that deceased was in the employ of the railroad company; but it is not shown how many persons were in the crew in charge of the

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freight train at Ypsilanti, nor is it shown whether there was one brakeman or more. While it was shown that there was a lantern upon the first car, which was switched upon the side track, it is not shown that deceased carried that lantern, or that he was upon that car. While it was shown that one or more other cars were sent in on the switch, it is not shown whether a brakeman was or was not on the car or cars so sent in. While the cars were heard to come together, it is not shown whether decedent was on either of the cars, and as the result of the impact was thrown to the ground, or whether he was already on the ground, and while there was injured. The cause of his injury is entirely in the field of conjecture. The case is within *Manning* v. *Railway Co.*, 105 Mich. 260 (63 N. W. 312); *Fuller* v. *Railroad Co.*, 141 Mich. 66 (104 N. W. 414); *Micari* v. *Stone Co.*, 154 Mich. 362 (117 N. W. 939).

Judgment is affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

HOLMES *v.* SOULE.

1. DEEDS—QUITCLAIM DEED—GOOD FAITH.

The owner of realty by virtue of a quitclaim deed stands in no better position than his grantor.

2. LIMITATION OF ACTIONS—TAXATION—TAX TITLE—STATUTES.

Act No. 58, Pub. Acts 1907 (1 How. Stat. [2d Ed.] § 1843), imposing a five-year limitation upon the right to attack a tax title, does not affect tax interests purchased prior to

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its enactment, since the legislative intent to give the act retroactive effect is not made clear.

3. SAME—TAXATION.
As a rule general statutes of limitation must operate uniformly.

4. TAXATION—POSSESSION—QUIETING TITLE.
By entering into possession of lands under a claim of ownership through certain tax deeds, the grantees did not obtain any rights, if a valid notice to redeem was not served on the proper parties. Service of notice is a condition precedent to the vesting of title in the purchaser.

5. SAME—LIMITATIONS, FIVE YEAR.
Section 73 of Act No. 206, Pub. Acts 1893, providing that no tax sale or deed of the State shall be set aside after the purchaser has been in actual possession for five years has been held to be repealed by implication. *Cook Land, etc., Co.* v. *McDonald*, 155 Mich. 175 (118 N. W. 959).

6. SAME—EQUITY.
Where the holder of a tax title served a notice upon the owner of record, stating the total amount required for the redemption of two parcels, which was therefore defective and insufficient, and where neither party was shown to have been in possession of the land, no equitable relief could be granted to the grantee of the holder of title who did not ask for the right to redeem or offer to pay the amount required.

7. SAME—LACHES—EFFECT.
Mere delay on the part of the owner to assert his rights against the claimant under a tax title who did nothing in reliance upon the silence of such record owner, is insufficient to confer any right although an insufficient notice to redeem was served.

Appeal from Ottawa; Cross, J. Submitted January 23, 1914. (Docket No. 50.) Decided June 1, 1914.

Bill by Clyde J. Holmes against Charles E. Soule and others. From a decree dismissing bill and defendants' cross-bill, both parties appeal. Affirmed.

Walter I. Lillie, for complainant.

Soule & Soule, for defendants.

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OSTRANDER, J. Complainant claims title to lots 3 and 4, section 18, town 8 N., of range 16 W. His evidence of title is a quitclaim deed from the owner of the original title, dated March 5, 1913, and recorded. He filed the bill of complaint in this cause March 24, 1913, setting up his title and the defendants' title, and praying that defendants may be decreed to convey to him all right, title, and interest in the land claimed by them, or either of them. Defendants answered the bill, and in their answer claim the benefit of a cross-bill, and as affirmative relief ask that a decree be entered that the complainant's deed is void, and requiring complainant to convey to defendants all his right, title, and interest in the lands. The cross-bill was answered, and, the cause being at issue, it came on for hearing in open court in September, 1913, and certain testimony was offered and received. The court below found and decreed:

"I. That the bill of complaint was filed in this cause to quiet the title to the following described real estate, viz.: Lots 3 and 4 of section 18, town 8 north, range 16 west, Ottawa county, Michigan.

"II. That the complainant claims title through a quitclaim deed obtained from the person to whom the fee vested through a regular chain of title from the original purchaser.

"III. That the cloud upon the title which the complainant seeks to have removed are a tax deed given by the auditor general to Edward S. Craw, a deed given by Edward S. Craw to Charles E. Soule, a deed for one-half interest given by Charles E. Soule and wife to Wm. N. Angel, and a deed given by Wm. N. Angel to Daniel W. Andrews, Anna Angel Andrews, George E. Angel, Clara M. Angel, Henry A. Angel, and Edith Angel.

"IV. That at the tax sale the lots were sold separately, being so assessed. The aggregate purchase price paid was $228.89, being the taxes upon both lots from the year 1888 to 1901. Both lots were included in one deed, and the notice given to perfect the tax title gave the total amount paid for both lots, but did

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not specify the amount paid for each. That such notice did not comply with the law.

"V. That said notice as above described was served upon complainant's grantor on the 8th day of December, 1902, and was actual notice of the sale of the lots for delinquent taxes, although the notice was not in legal form to cut off redemption, or upon which a writ of assistance could be based.

"VI. The complainant, holding by quitclaim deed, has imputed to him the delinquencies of his grantor. The lots had been returned delinquent for taxes since 1888, and since 1902 the defendant had paid the taxes. That no attempt or offer was ever made since 1888 by the complainant or his grantor to pay these taxes.

"VII. The claim of laches urged by the defendant under and by virtue of the decision of the case of *Clothier* v. *Miller* [173 Mich. 530 (139 N. W. 253)], is conclusive in this case.

"VIII. It is therefore adjudged and decreed that the bill of complainant be and the same is hereby dismissed, without prejudice, with costs to the defendant, to be taxed, and that they have execution therefor."

All parties have appealed. It should be stated as a fact relied upon by complainant that no attack is made by the bill upon the tax proceedings or the sale of the land for taxes. The contrary is expressly charged in the bill.

The real contentions of parties may be briefly stated. Complainant claims that, because no valid notice to redeem was given to his grantor within five years after the purchase of the tax title, defendants are barred from asserting the title, and from claiming a lien upon the land by virtue thereof. Act No. 58, Pub. Acts 1907 (1 How. Stat. [2d Ed.] § 1843). Defendants say this act cannot have a retroactive effect. They also claim that their grantor gave a notice, imperfect it is true, which the original owner admitted receiving, and before receiving, expressly, and thereafter, by conduct, refused to redeem the

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land; that after six months after giving said notice defendants' grantor entered into possession of the premises, claiming them by virtue of his tax title, and peaceably occupied them until this suit was begun, paying the taxes. The laches of complainant's grantor, and his practical abandonment of the premises in 1902, is asserted as a bar to any equitable relief favoring complainant, and all the circumstances are relied upon as entitling defendants to a decree quieting their title.

Before investigating the claim of either party to equitable relief, it is well enough to see where the law leaves them. Complainant is in no better position than his grantor was, but, for convenience of statement, may be said to have the original, or government, title to the land. Assuming, as we must, that the tax titles are valid, the original or government title is extinguished (*Griffin* v. *Kennedy*, 148 Mich. 583 [112 N. W. 756]; *Embury* v. *Goodenough*, 157 Mich. 140 [121 N. W. 744]; *Haney* v. *Miller*, 154 Mich. 337 [117 N. W. 71, 745]; *Horton* v. *Helmholtz*, 149 Mich. 227 [112 N. W. 930]), saving only the right, given by the statute, to redeem the land by paying the taxes and a penalty. No other or additional right accrued to him by virtue of Act No. 58, Pub. Acts 1907, because the act has no application. In the first place, the intention of the legislature that the act passed in 1907 shall have retroactive effect is not clear, and, in the second place, the tax deeds established between the purchaser and the State contract relations which it will not be presumed the State intended to violate or to change. A third reason may be stated, which is that a general statute of limitations must operate uniformly, and the statute invoked would not do so if it were applied to titles acquired before the law was passed.

Defendants own the tax title and the land, subject to the right of complainant to redeem—a right which

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in law has not been extinguished because no proper notice to redeem has ever been given. Defendants are not aided, in law, by having occupied the land, if in fact they have occupied it (a fact not found by the trial court, and of which the testimony is not convincing), because they had no right to its possession. *Corrigan* v. *Hinkley,* 125 Mich. 125 (83 N. W. 1020); *Huron Land Co.* v. *Robarge,* 128 Mich. 686 (87 N. W. 1032); *Holmes* v. *Loud,* 149 Mich. 410 (112 N. W. 1109); *Cook Land, etc., Co.* v. *McDonald,* 155 Mich. 175 (118 N. W. 959); *Morrison* v. *Semer,* 164 Mich. 208 (129 N. W. 1); *White* v. *Dunsmore,* 167 Mich. 542 (133 N. W. 523); *Powell* v. *Pierce,* 168 Mich. 427 (134 N. W. 447); *McRae* v. *Barber,* 171 Mich. 111 (136 N. W. 1118). In *Huron Land Co.* v. *Robarge,* it was said that service of a notice is a condition precedent to vesting title in the tax title purchaser. In *Morrison* v. *Semer, White* v. *Dunsmore,* and *Powell* v. *Pierce,* imperfect notices had been given. In *White* v. *Dunsmore,* the lands in question were wild and uncultivated, and it was held that the owner of the record title could not maintain trespass for the wrongful entry of the holder of the tax title before tendering the amount required to be paid for a reconveyance. In *Adkin* v. *Pillen,* 136 Mich. 682 (100 N. W. 176), the land was occupied by the owner of the original record title, and we said:

"Notwithstanding the fact that the State had acquired the absolute ownership of this land, and notwithstanding the language above quoted, the title acquired by defendant was, by Act No. 229 of the Public Acts of 1897, subject to redemption for a period of six months, and during this time defendant was not entitled to possession of the land. We have recently held (see *Auditor General* v. *Sherman,* 136 Mich. 157 [98 N. W. 995]) that, notwithstanding the language of section 72, above quoted, the title thereby conveyed is subject to sale for prior taxes under certain conditions, by virtue of Act No. 169 of the Public Acts

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of 1899. It is equally clear that we are bound to hold that, by Act No. 229 of the Public Acts of 1897, said title acquired under section 72 did not become absolute—and this is true whether that title had or had not become absolute in the State before sale—until the period for redemption had expired. Until the expiration of this period, during which the original owner has the sole right of possession and the right to redeem from outstanding tax titles, such owner, and not the owner of said tax titles, which may or may not become absolute, is the owner of the property."

Section 73 of the tax law (Act No. 206, Pub. Acts 1893 [1 How. Stat. (2d Ed.) § 1842]), relied on by defendants, was, as applied to a case like this, held repealed by implication in *Cook Land, etc., Co.* v. *McDonald, supra.* Proceeding no further, it would appear that, when this suit was begun, the parties in interest were in no better nor worse position, relatively, than when the defendant's grantor acquired the tax titles.

Complainant, in a court of equity, admits that the tax title purchaser served a notice upon his grantor December 8, 1902, and charges, what is admitted to be true, that the notice was defective because, in advising his grantor of the sale of both parcels and of the amount required to redeem both, it did not specify nor disclose what amount could be paid to secure a reconveyance of either parcel. *Jackson* v. *Mason,* 143 Mich. 355 (106 N. W. 1112). He asks the court to apply in his behalf the statute which has been referred to. No other ground of relief being asserted, and complainant not having offered to now redeem the land, nor asked for permission to do so, no equitable relief can be granted to him.

Neither party having been in possession of the land, there is no controlling statute of limitations. Defendants and their grantor have done nothing in reliance upon the silence of complainant's grantor.

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They have paid the taxes, which they were obliged to do to protect their interest. Laches implies negligence—a neglect or failure to do what ought to be done under the circumstances to protect the rights of the parties to whom it is imputed, or involving injury to the opposite party through neglect to assert rights within a reasonable time. Usually one having an interest in land which is not in the actual possession of another is under no obligation to assert his interest until it is attacked, and there seems to be no good reason for saying that one having such a right as the complainant claims may not remain silent until his right is questioned. In any event there is no apparent reason for holding that the right is cut off and lost in favor of another who has taken ineffectual proceedings to divest it. The case presented is not like *Bending* v. *Auditor General,* 137 Mich. 500 (100 N. W. 777), *Beuthien* v. *Dillon,* 160 Mich. 396 (125 N. W. 363), *McFarlane* v. *Simpson,* 153 Mich. 193 (116 N. W. 982), *Owens* v. *Auditor General,* 147 Mich. 683 (111 N. W. 354), *Clothier* v. *Miller,* 173 Mich. 530 (139 N. W. 253), and similar cases, in which, because of laches, relief is denied to a complainant. Nor is it like *Aztec Copper Co.* v. *Auditor General,* 128 Mich. 615 (87 N. W. 985), *Croskery* v. *Busch,* 116 Mich. 288 (74 N. W. 464), *Horton* v. *Salling,* 155 Mich. 502 (119 N. W. 912), *Morrison* v. *Semer,* 164 Mich. 208 (129 N. W. 1), and *Backus* v. *Hoyt,* 164 Mich. 407 (129 N. W. 693), where equitable relief was granted upon condition that the complainant do equity.

I am of opinion that the parties must be remitted to enforcement of their legal rights—a conclusion which requires the affirmance of the decree, without costs of this court to either party.

MCALVAY, C. J., and BROOKE, KUHN, STONE, BIRD, and STEERE, JJ., concurred. MOORE, J., did not sit.

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EVANS *v.* RUSSELL.

BROKERS—EVIDENCE—COMMISSIONS.

Evidence tending to show that plaintiff brokers undertook to sell real property of the defendant for a price agreed upon, that they found a purchaser ready and willing to pay the price asked, that defendant declined to make the conveyance because his wife would not sign the deed, defendant disputing the claim of plaintiffs as to the contract, *held*, to present an issue of fact which was properly submitted to a jury.

Error to Ingham; Wiest, J. Submitted April 15, 1914. (Docket No. 46.) Decided June 1, 1914.

Assumpsit by Louis M. Evans and Charles L. Fratcher against Henry Russell for brokers' commissions. Judgment for plaintiffs. Defendant brings error. Affirmed.

Frank L. Dodge, for appellant.

Harry A. Silsbee (Person, Shields & Silsbee, of counsel), for appellees.

OSTRANDER, J. The issue in this cause is simple. The testimony on the part of plaintiffs, who are partners, tended to prove that they undertook for the defendant to sell his real estate for $14,000 for which they were to be paid a commission of $400; that they produced a purchaser able and willing to pay the price; that the defendant then refused to sell, giving as a reason that his wife would not join him in conveying the property. On the part of defendant the testimony tended to prove that he made no such bargain with plaintiffs; that his property was only for sale upon a contingency, which did not occur. Specific denials of the material testimony of plaintiffs were

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given. There was testimony which, if believed, warranted a verdict for plaintiffs. The cause was submitted to a jury with instructions, which, although criticised, seem to us to correctly state applicable rules of law. A motion for a new trial was denied. We have examined the assignments of error, 47 in number, have read the record with care, and are of opinion that none of the errors are well assigned.

The judgment is affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

BARBRICK v. WHITE SEWING MACHINE CO.

1. TROVER AND CONVERSION—VALUE—DAMAGES.
   Evidence that a sewing machine which defendant's agent was charged with converting had cost a stated sum and testimony comparing the work done by it with the work of a new machine, was admissible, upon the question of damages in trover.

2. DAMAGES—VALUE—EVIDENCE.
   Plaintiff's damages, in an action of trover for converting a second-hand sewing machine, were not limited to the market value, which defendant's agent testified was only $5 or $10, where plaintiff and his wife gave testimony tending to show the cost and present value and that it worked about as well as a new one; the owner being entitled to full compensation for his property.

Error to Kent; McDonald, J. Submitted April 7, 1914. (Docket No. 1.) Decided June 1, 1914.

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Trover in justice's court by William Barbrick against the White Sewing Machine Company for conversion of a sewing machine. From a judgment for plaintiff, defendant appealed to the circuit court in which judgment was rendered for the plaintiff. Defendant brings error. Affirmed.

Holmes & Holmes and *Don E. Minor*, for appellant.

Dunham & Dunham, for appellee.

MOORE, J. This suit is in trover. It was brought in justice's court to recover the value of a sewing machine. The plaintiff recovered a judgment for $30. The case was appealed by defendant to the circuit court, where plaintiff again recovered a judgment of $30. The case is brought here by writ of error.

Counsel for appellant say, we quote from the brief:

"There are no intricate questions of law involved in this case. It seems to us that all the questions involved and upon which error is assigned are too elementary to admit of discussion, and counsel desire to say at the outset that, but for the fact that the defendant is conducting a large business in this and other parts of this State in which the result of this case in the trial court might establish a dangerous precedent, the amount herein involved would not justify its seeking to have it reviewed by this court.

"While defendant has alleged 11 assignments of error upon the trial, it will be apparent that the error chiefly relied upon will be the improper admission of testimony offered by plaintiff by which he sought to show the value of the old machine, or, in other words, to show plaintiff's measure of damages, and that the verdict is against the weight of the evidence, and the damages are excessive."

The plaintiff is a married man with a wife and four children. It is his claim that his wife does not speak English well, and that in his absence an agent of defendant visited his house and tried to exchange a new machine for the one they had in the house; that

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his wife declined to make any exchange in the absence of her husband, but that she was persuaded by the agent to allow him to take the old machine and leave a new one, the agent assuring her that if the husband did not approve he would return the old machine and take away the new one. It is the further claim that the agent left with the wife, though no money was paid, a paper reading:

"September 13, 1910.

"Received of Mrs. William Barbrick cash, $5.00, and old machine, $5.00, total paid, $10.00; balance $35.00, to be paid $2.00 monthly from this date.

"WHITE SEWING MACHINE,

"———, Agent."

He also left with her a contract containing, among other things, the following:

"Having paid by cash, $5.00 and by Disc. $5.00 (stipulated rent for the first month only) for which I receive the company's so-called 'blue paper' receipt, I further agree to pay at the office of the said company, at Grand Rapids, Mich., or to its authorized collector, the sum of three dollars on the 25th day of each and every month after date, upon condition that when the entire amount of forty-five dollars, the agreed value of said sewing machine, including first payment, shall have been paid by me, the said company shall upon demand make me a bill of sale of said machine. And I agree to pay the said monthly rental until the balance of said agreed value shall have been paid; and it is further expressly understood that until the whole sum of said agreed value whether in judgment or not, shall be paid, the said White Sewing Machine Company neither parts with nor do I acquire any title to said White Sewing machine.

"And I agree that until this contract is fully paid, with interest after maturity, all payments made by me shall be considered by the parties hereto as payments by me for the use and rental of said machine under the terms hereof."

A sum of $5 was indorsed on the back of this paper.

It is the further claim of plaintiff that, when he

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reached home and found out what had been done, he did not approve, and that the agent was so notified in writing by means of a postal card, the next day; that the agent replied by postal that he regarded the transaction as a sale and should expect payments to be made according to the contract. No payments were made, nor was the old machine returned. The plaintiff declined to let the defendant take the new machine until the old one was returned.

The defendant claimed it was unable to return the old machine, but was willing to replace it with another, and finally brought replevin for the machine left at the house of the plaintiff. No defense was interposed to this action, and defendant recovered the machine. This action was then brought, with the result before stated. Upon the trial in the circuit court the plaintiff was allowed to testify to the cost of his machine, and he and his wife were both allowed to testify as to how its work compared with the work done by the machine left by the agent of defendant. Error is assigned upon the admission of this testimony.

Defendant gave testimony tending to show that the machine of plaintiff was not worth more than $5 to $10, and it is its claim that plaintiff is entitled to recover only the market value of his machine, and that the verdict of $30 is excessive.

In *Rose* v. *Lewis*, 10 Mich. 483, which was an action of trover for the wrongful conversion of a promissory note, Justice CAMPBELL, speaking for the court, said:

"It is undoubtedly true that damages for the conversion of articles having a regular market value are measured generally by that value. But that is only because such a measure furnishes the precise redress which the law always aims at giving, by making good as near as may be the injury which the aggrieved party has sustained. Where articles have not a standard or market value, then their value to the owner, so far as they are susceptible of pecuniary measure-

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ment which is not fanciful or merely speculative, furnishes the true test."

A judgment for the full amount of the note was sustained, though some witnesses for the defendant testified that the maker of the note was in debt and had no property to pay his debts.

In *Dalton* v. *Laudahn*, 27 Mich. 529, it is said:

"The rule seems to be settled that when property is tortiously taken, the owner is not only entitled to an action, but to full compensation in damages."

In *Smith* v. *Mitchell*, 12 Mich., at page 191, it is said:

"Evidence of what the property brought at auction is admissible, as having some tendency to prove value."

In *Worthington* v. *Hanna*, 23 Mich., at page 534, it is said:

"It is also alleged as error that the court refused to instruct the jury to disregard the appraisement made under the attachment proceedings, in estimating the value of the goods.

"Plaintiff in error was allowed to introduce testimony on this subject, and the appraisal was left to the jury for what it was worth and not as in any way conclusive. We do not think there was any objection to this. It is a sworn valuation, made under the statute by persons selected by the plaintiff in error himself, as most likely to value the property judiciously. It is so far conclusive that the sheriff is compelled to release the property on a bond proportioned by its value. Testimony of value, being very much matter of opinion, has been received from many sources supposed to be reasonably reliable, upon less security against error than exists here. In *Smith* v. *Mitchell*, 12 Mich. 180, we allowed auction prices to be considered. In *Sisson* v. *Railroad Co.*, 14 Mich. 489 [90 Am. Dec. 252], values were allowed to be shown by the published prices current. In *Cliquot's Champagne*, 3 Wall. [U. S.] 114, and *Fennerstein's Champagne*, 3 Wall. [U. S.] 145, a still more liberal rule was adopted. There may be serious objections to

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making any of these extraneous estimates conclusive. But when an appraisement is made in pursuance of a statute under oath, in the course of the proceedings, under which the party has himself acted, and he himself selected the appraisers, we think it would be going too far to say that such a valuation is entirely worthless as evidence against him. Assuming that he acted fairly in selecting them—and this is a reasonable presumption—it must be supposed that the safeguards provided by the statute with an express reference to securing this evidence will give it at least a claim to consideration against the officer who obtained it. See, also, *Comstock* v. *Smith*, 20 Mich. 338; *Kermott* v. *Ayer*, 11 Mich. 181."

We do not think there is occasion to reverse this case.

Judgment is affirmed.

McALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

O'NEIL *v.* BROOKS.

1. CHATTEL MORTGAGES—DEBTOR AND CREDITOR—FILING.
   A creditor, whose claim arose after the giving by his debtor of a chattel mortgage, which was not filed in the office of township clerk, is entitled to assert against such chattels a judgment and execution lien obtained after the mortgage was duly recorded (Act No. 258, Pub. Acts 1905, § 10, 3 How. Stat. [2d Ed.] § 11407) if the conveyance was not accompanied by an actual and continued change of possession of the mortgaged chattels.

2. SAME—CHANGE OF POSSESSION—BAILMENTS.
   Where mortgaged horses were turned over to a creditor

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of the owner, to be used at an agreed rate and the same applied on the indebtedness, and there was no evidence that the bailee creditor was to take possession and hold them for the mortgagee of the team, no such change of possession in behalf of the mortgagee was shown as to protect his interest against the rights of a subsequent creditor of the mortgagor without notice.

Error to Marquette; Flannigan, J., presiding. Submitted April 17, 1914. (Docket No. 62.) Decided June 1, 1914. Rehearing denied December 19, 1914.

Replevin by James O'Neil against Arthur Brooks for two teams of horses and their harness. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

J. L. Heffernan (C. F. Button, of counsel), for appellant.

W. S. Hill, for appellee.

STEERE, J. This is an action in replevin, involving two teams of horses and their harnesses, brought here for review from the circuit court of Marquette county, where, upon trial by jury, judgment was rendered on a directed verdict for defendant.

Before, and at the time, the parties to this suit became interested in the property in question it belonged to Reichel Bros., a lumbering firm of Marquette county, whose title defendant subsequently acquired on execution sale. Plaintiff's claim is based upon a chattel mortgage given him by Reichel Bros.

On September 12, 1911, the corporation of A. G. Wells Company commenced an action against Reichel Bros. upon a note given in March, 1911, maturing in July, 1911, and at the same time instituted garnishment proceedings against the Consolidated Fuel & Lumber Company, as garnishees of Reichel Bros. Said fuel and lumber company disclosed that the

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horses and harnesses involved were held by it under a contract with the principal defendants, whereby the garnishee defendant had use and possession thereof until satisfaction of a debt due it from the Reichel Bros.; which contract provided that Reichel Bros. were to be credited with the sum of $35 per month for the use of each team and its harness, and that there was at the time of the disclosure yet owing and unpaid upon said indebtedness the sum of $317.19, for which a lien upon said property was claimed by the garnishee defendant.

On December 6, 1911, A. G. Wells Company recovered in the action upon its note a judgment against Reichel Bros. for $311.81 damages and costs. On the concurrent proceedings in garnishment a judgment was entered providing in part as follows:

"It is hereby determined that at the time of the service of the writ of garnishment in this cause upon said garnishee it had in its possession and under its custody and control the following goods and chattels of the said principal defendants, viz.: One team of horses [describing them] and two sets of heavy double harness, including collars, which said goods and chattels were then and are now held by the said garnishee under a contract with said principal defendants, whereby the said garnishee has a lien thereon and a right to retain possession of said goods and chattels and have the use thereof until the full payment to said garnishee of the sum of $71.69, which constitutes the amount of said lien at the rate of $35 per month for the use of each of said teams and harness."

By said judgment the garnishee defendant was also ordered to deliver said property to the sheriff on demand, to be sold by him to satisfy the execution to be issued upon said judgment, subject to the amount of said lien.

An execution was issued in said garnishee proceedings, reciting the principal judgment, the garnishment, and the garnishee judgment, commanding the

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sheriff to satisfy thereunder, out of the property, the amount of the principal judgment and costs in the garnishee proceedings, subject, however, to the lien of the garnishee.

Under this execution the sheriff levied upon said property March 1, 1912, and, after seizure, on the same day made an arrangement with the garnishee defendant, by which the latter gave him a receipt for the property, agreeing therein to hold possession thereof until the 14th of said month, and then turn the same over to him, subject to its lien; that being the day set by the sheriff for execution sale. On that date the sheriff sold said property to defendant, Brooks, as the highest bidder, for the sum of $375, subject to said lien of garnishee defendant, amounting at the date of sale to $17.69. Brooks at that time had also levied an execution upon this property to satisfy a judgment against Reichel Bros. for the sum of $707.98 obtained by him March 8, 1911, with similar ancillary proceedings in garnishment against the same garnishee defendants.

After Brooks secured possession of the property, plaintiff seized it under a writ of replevin, as being property covered by a chattel mortgage dated January 9, 1911, given him by Reichel Bros. to secure the sum of $2,000 which he had loaned them. Said mortgage was not, however, filed for record until January 10, 1912.

On January 14, 1911, after said loan was negotiated, but before the chattel mortgage was delivered, Reichel Bros., with plaintiff's consent, gave possession of this property to the fuel and lumber company, under a contract to turn the same over to the latter, to be worked and used in payment of a debt Reichel Bros. then owed it, amounting to $522; said fuel and lumber company agreeing to credit upon said indebtedness the sum of $70 per month for the use of said property, keep and care for the same, and furnish

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food and drivers for said horses while in its possession.

Shortly after the fuel and lumber company received possession of this property under said contract, it further agreed with Reichel Bros. to furnish the latter from time to time certain supplies, the amount of which should be charged in and become a part of the original indebtedness owing from the latter to the former, and did so furnish the same to the amount of $460, of which supplemental agreement plaintiff was informed by Reichel Bros., and to them gave his consent thereto.

The fuel and lumber company retained, used, and worked said property until the entire indebtedness owing it by Reichel Bros. was paid, including the $18 yet due when defendant bought the same on execution sale, after which he took possession, and plaintiff took it from him, after demand, by writ of replevin, claiming right thereto under his chattel mortgage.

After the property was replevied, default was entered by defendant against plaintiff for failing to file a declaration, and before the case came to trial a stipulation was entered into by counsel of record, providing in part:

"* * * That the default of the plaintiff heretofore entered in this cause may be, and the same is, hereby set aside, and the plaintiff allowed to serve copy of his declaration in this cause instanter; * * * that upon the trial of the above-entitled cause it will be admitted that all the proceedings in the case of A. G. Wells Co., a corporation, v. George Reichel *et al.*, principal defendants, and the Consolidated Fuel & Lumber Company, garnishee defendant, and also all the proceedings in the case of Arthur Brooks against the same principal and garnishee defendants, were regular and proper and effective for the purposes thereof, it being the intention hereby to give the said defendant all the benefit that he could derive from such proceedings when regularly and properly carried

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through, but not to admit that such proceedings, when so conducted, operated to give to the plaintiffs therein such prior rights in the property seized under the writ in this cause as to enable them, or either of them, to sell the same free of the chattel mortgage lien of this plaintiff thereon, that question to remain to be litigated the same as though this stipulation had not been entered into; said O'Neil not admitting these said plaintiffs did not have notice of his chattel mortgage and rights prior to and after judgment in said garnishee proceedings, either by themselves or agents or attorneys."

As to this stipulation, it is urged by present counsel for appellant that an attorney has no implied power to release errors in the record; that this was entered into under a misapprehension, is but mere admissions of law which the court is not required to act upon if satisfied to the contrary, and ought not to be held binding under the circumstances. Assuming that it will not be, counsel argue at length in their brief against the regularity and validity of the proceedings in the cases mentioned.

Without reviewing in detail the questions there raised, it is sufficient to state that we are not satisfied that the irregularities complained of render those proceedings invalid, and, under this record, we conclude the only serious question for consideration is that of the priority between plaintiff's chattel mortgage and defendant's title under the execution sale.

The trial court held that the lien, by virtue of said garnishee proceedings and judgment, took priority over plaintiff's chattel mortgage, which was unrecorded at the time such lien attached, and therefore directed a verdict in favor of defendant for the value of said property, which, as an issue of fact, was submitted to the jury under proper instructions, resulting in a verdict against said plaintiff in the sum of $641.25.

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The recording law relative to chattel mortgages (section 10, Act No. 258, Public Acts 1905), provides that:

"Every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels, which shall hereafter be made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the township clerk * * * where the goods or chattels are located," etc.

The indebtedness for which A. G. Wells Company obtained judgment against Reichel Bros. arose out of credit extended March 10, 1911, while plaintiff's mortgage was withheld from record. The company's claim accrued subsequent to the execution and delivery of an unrecorded chattel mortgage, and it could therefore assert a lien upon the property before or after the mortgage was filed under the recording law. This whole subject has been so recently reviewed, with numerous authorities cited, in *People, for use of Esper*, v. *Burns*, 161 Mich. 169 (125 N. W. 740, 137 Am. St. Rep. 466), and *City Bank & Trust Co.* v. *Hurd*, 179 Mich. 454 (146 N. W. 299), that further discussion of that question here is unnecessary.

It is the contention of plaintiff that there was, in legal effect, under the facts shown, such a delivery or change of possession of the things mortgaged at or about the time of delivering the instrument to him as to relieve plaintiff from the necessity of recording the mortgage, not by actual delivery of the property to him, but into the hands of a third party with his consent, who had notice of his mortgage, held actual and exclusive possession against the mortgagor, and, as a matter of law, held possession for the mortgagee.

It may be conceded that, if this property was turn-

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ed over to the fuel and lumber company to hold for plaintiff, while its indebtedness was being worked out, such change of possession would be sufficient to protect his security, but the record fails to show such was the case. Plaintiff is not shown to have been a party to the contract by which Reichel Bros. turned the property over to the fuel and lumber company or to even have communicated with the latter on the subject; his dealings were with Reichel Bros., in which he gave them his consent to their letting the fuel and lumber company take the property and use it for a time. There were no contractual relations between him and the latter, and whether it even had notice or knowledge of his chattel mortgage is a matter in dispute. Its possession came from Reichel Bros. with their consent, was for an indefinite time, not hostile nor adverse to their title, and was contingent on their indebtedness being paid to it. They had, so far as shown, the right at any time to pay up the balance owing and take their property. The property was being held by the bailee for the bailor from whom it was received and with whom the contract of bailment was made, and from whom there were no instructions to return the property at the expiration of the bailment to any third party.

We conclude the learned circuit judge correctly held that, under the undisputed evidence in this case, there was no change of possession, as between mortgagor and mortgagee, and plaintiff's chattel mortgage was invalid as to the A. G. Wells Company, which became a creditor of the mortgagor in good faith after said mortgage was given and before the same was put on file and of record.

The judgment is affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

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HICKEY *v.* SHELLENBARGER.

1. MALICIOUS PROSECUTION—ELEMENTS.

   To entitle a plaintiff to recover for malicious prosecution, three things must concur and be established by a preponderance of the evidence: that the prosecution was begun and came to a legal termination in favor of the plaintiff, that the defendant instituted it without probable cause, and that in so doing he was actuated by malicious motives.

2. SAME—MALICE—TRIAL.

   If there is any evidence in the case tending to prove malice, the question is for the jury to determine whether a malicious motive existed: it may be proved by direct evidence or it may be inferred from circumstances. And where there was evidence of acts of violence committed by the defendant and expressions of ill will, with facts and circumstances in the dealings of the parties from which malice might be inferred, the issue became one of fact for the jury.

3. SAME—INTOXICATING LIQUORS—PROBABLE CAUSE.

   Where the defendant made a complaint before a justice of the peace, charging the plaintiff with selling him a quart of whisky and the plaintiff denied that he sold or furnished a bottle of whisky at the time and place stated, *i. e.*, in a county that had adopted prohibition, defendant's testimony that plaintiff did sell the bottle of whisky as charged, furnished evidence of probable cause for making complaint, but if such testimony was untrue as charged by the plaintiff and as shown by his proofs, there was want of probable cause for the prosecution, and plaintiff's evidence made out a *prima facie* case.

4. SAME—HEARSAY EVIDENCE—PRELIMINARY EXAMINATION—WITNESSES.

   Evidence offered to show what the witnesses stated in their examination before the justice of the peace was correctly excluded, the testimony was inadmissible to establish the contention that the discharge of plaintiff from custody was erroneous and a miscarriage of justice.

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5. SAME—EVIDENCE—CRIMINAL LAW—OTHER OFFENSES.
Proof of other offenses similar to the one with which defendant charged the plaintiff, who was taken into custody for the offense complained of, is not competent, in an action for malicious prosecution, to prove the plaintiff's guilt of the offense for which he was arrested.

6. SAME.
Nor did the court err in charging the jury that evidence of the plaintiff's discharge from arrest was admitted solely to prove the termination of the criminal proceeding and could not be considered as proof of want of probable cause.

Error to Shiawassee; Miner, J. Submitted April 9, 1914. (Docket No. 19.) Decided June 1, 1914.

Case by Otto Hickey against Henry Shellenbarger for malicious prosecution. Judgment for plaintiff. Defendant brings error. Affirmed.

Chapman, McNamara & Matthews, for appellant.

Roy M. Chrouch (George E. Pardee, of counsel), for appellee.

STEERE, J. This is an action for malicious prosecution involving a judgment against defendant for six cents damages and equal costs, brought here by defendant for review on a writ of error for the purpose, as we are informed, of maintaining his right, as a citizen willing to vindicate the law and assist the suppression of crime in discharge of his duty to society, to protection from annoying litigation resulting from such public service.

Plaintiff and defendant were formerly friends and copartners in the business of spraying orchards in Shiawassee county, but differences arose between them which resulted in their ceasing to prosecute the business after some time in February, 1912, though they were unable at that time to satisfactorily adjust their partnership affairs and fully dissolve such rela-

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tions, in consequence of which unfriendly feeling developed. While their relations were friendly, Hickey procured some whisky, of a brand known as the "Golden Gift," by express, from Covington, Ky., for medical purposes, as then assumed and said, in the consumption of which both participated, according to the demands of their health or inclinations. The number of times it was procured and the circumstances under which defendant participated and obtained his portion are questions upon which they are not in harmony. Defendant claims it was procured by plaintiff on three different occasions; plaintiff admitted that it was ordered once by him, but claimed it was for both of them acting in co-operation, either in January or February, 1912, when the weather was very cold. His account of the transaction and his agency is as follows:

"It was 14 months before the warrant was sworn out. I said to Shellenbarger, 'I believe I am sick, coming down with the grip;' and I says, 'I have got to do something for this or I won't be able to go any further;' so I says, 'I believe I will send and get a gallon of whisky and see if I can't break up my cold.' Mr. Shellenbarger says to me, he says, 'I believe I have got the same thing;' and he says, 'While you are sending, get some for me.' I says: 'Mr. Shellenbarger, I am going to get a gallon, and I don't need it all. If you want some and you order it, why I will get it for you.' So he asked me what it was, and I told him it was $3.20 per gallon, or five quarts; there was one quart thrown in free. I told him I would figure in that quart just the same as I paid for it.' He said 'You send and get one quart bottle for me,' and offered to pay me. It was so awful cold my hands were frozen stiff. My coat was buttoned up. And I says to Shellenbarger, 'Never mind, I will advance the money for you, and you can pay me some other time.' He says, 'Very well.'"

That the "Golden Gift" was procured from Kentucky and possessed special medicinal properties is

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said to bear some relation to the fact that Shiawassee county was under the local option law, so called, and the sale or giving away of intoxicating liquors in that territory was prohibited.

After the estrangement of these parties and their inability to settle their partnership affairs became acute, it is claimed by Hickey that Shellenbarger, who was an athlete and had manifested his prowess while on the police force in the city of Toledo, commenced a course of intimidation towards the former both by physical demonstrations and by threatening to make him trouble on account of his having procured and furnished liquor to others in violation of law. Different witnesses testified to such threats and physical violence by Shellenbarger, at one time reaching a point where he grabbed Hickey by the throat and choked him. A settlement of their business matters was reached about a year after they ceased doing business, under circumstances which did not altogether relieve their strained relations.

In the fall of 1912 Shellenbarger became a candidate for sheriff of Shiawassee county on the Progressive ticket, and Hickey does not appear to have been favorably disposed to his candidacy. During the campaign each insinuated that the other had been guilty of violating the local option law, and threats of prosecution were made in that connection.

On February 27, 1913, Shellenbarger made an affidavit before Gustav F. Friegel, a justice of the peace, charging Hickey with selling deponent one quart of whisky in the city of Owosso on the 21st of April, 1912, receiving therefor the sum of 60 cents. Upon this a complaint was sworn to by a deputy sheriff, and a warrant issued charging Hickey with violation of the local option law. An examination had before said justice resulted in the discharge of Hickey; the justice finding that there was no probable cause to suspect

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him guilty of the commission of the offense charged, on the date stated. Following Hickey's discharge he commenced this action against Shellenbarger for malicious prosecution. The case was tried before a jury in the circuit court of Shiawassee county, resulting in a verdict for plaintiff and assessment of damages in the sum of six cents. The various objections to the validity of this judgment propounded in defendant's assignments of error, and discussed, involve the claims that a verdict should have been directed for defendant because plaintiff failed to prove malice and want of probable cause, and admitted that he himself was guilty of violating the local option law; that defendant "acted in good faith to bring a man he believed guilty to justice;" that various errors were made by the court in its charge and in the admission and rejection of evidence.

To entitle plaintiff to recover in this action for malicious prosecution, these three things must concur and be established by a preponderance of the evidence: That the prosecution was begun and came to a legal termination in plaintiff's favor; that defendant instituted it without probable cause; and that in doing so he was actuated by malicious motives.

It is undisputed that the prosecution was instituted on the strength of an affidavit made by defendant, and that it has ended favorably to plaintiff, resulting in his discharge.

The question of malice calls for little consideration. It is always exclusively for the jury when there is any evidence in the case tending to establish it.

"It may be proved by direct evidence, or it may be inferred from circumstances." *Hamilton* v. *Smith,* 39 Mich. 223.

The record in this case contains both direct and circumstantial evidence, consisting of acts of violence, threats, and expressions of ill will, with facts and cir-

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cumstances in the dealings and relations of the parties from which malice might be inferred. Furthermore, in this record the testimony of the contending parties and their relations to the facts out of which the alleged malicious prosecution arose bring both the questions of malice and want of probable cause to a simplicity of inquiry which relieves from the necessity of resort to fine distinctions and detailed definitions often deemed essential to an understanding of their import. Both litigants claim and testify to first knowledge of the essential fact. No question of misinformation or misunderstanding is involved. Both of them have personal, positive, and direct knowledge of the absolute truth. Plaintiff testified he did not sell or furnish defendant a bottle of whisky at the time and place stated in the affidavit. His testimony makes out a *prima facie* case and, if true, establishes want of probable cause for the prosecution and the inference that it was begun maliciously, in bad faith. Defendant swore in his affidavit and testified on the trial that plaintiff did sell him a bottle of whisky at the time and place charged. If true, there was not only probable cause but positive and conclusive cause for the prosecution, and the question of malice is eliminated. If untrue, there was no cause, probable or possible. Whether he "acted in good faith to bring a man he believed guilty to justice" rests upon the same contingency. All citation of authorities and subtlety of reasoning circle back to these elemental propositions. According as the jury determined the truth or falsity of the direct and positive testimony of these opposing litigants, so the questions of probable cause and malice inevitably went. Evidence of their relations with each other and all facts and circumstances bearing on their veracity, or in any way legitimately tending to throw light on the transaction and refute or substantiate the testimony of either, was

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competent, and full latitude appears to have been given by the court in that respect, to both parties.

Complaint is made that it was not, in the particular that the court sustained an objection to admission of the testimony of certain witnesses taken at the examination before the magistrate in the criminal prosecution on account of which this action was brought; counsel for defendant stating its purpose was to show that plaintiff's discharge was wrongful and a miscarriage of justice. No claim was made that any of the witnesses at that examination were dead or for other reasons not available. It was undisputed that there was an affidavit by defendant, a complaint, warrant, and arrest of complainant, followed by an examination before the magistrate and discharge of plaintiff, legally terminating the case. The prosecution did not end on technical grounds but after examination of witnesses and an adjudication by the court. The details and reasons of the court for such decision were immaterial. The court rightly held that the discharge of plaintiff was only admissible and material to show the prosecution was terminated, and what evidence the magistrate had before him to govern his official action, or what he may have thought, was immaterial. Defendant was permitted to go fully into all the original facts and circumstances bearing on plaintiff's guilt and introduce whatever testimony he desired as to his knowledge, motives, the occasion for and circumstances of his making the affidavit.

It is urged that the circumstances under which the affidavit was made by defendant indicate that he acted in good faith and without malice, because he is shown to have made the affidavit at the solicitation of one Goodwin, who testified that he was looking after "bootlegging" in an effort to bring offenders in that particular to justice, and that a deputy sheriff, who heard defendant knew of certain facts implicating

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plaintiff, interrogated and solicited him to make complaint. It appears undisputed that matters reached a stage where it was understood by Goodwin, the officer, and others that defendant had made statements that plaintiff had violated the local option law to defendant's own knowledge on at least three different occasions, and when they interviewed him he asserted such to be the case. He accompanied them to the magistrate and there said he was willing to make an affidavit, but did not care to make complaint, and it is claimed that the officers selected, from the three offenses of which defendant told, the one for which the complaint was made, and therefore, as a matter of law, defendant cannot be held responsible for such selection. This is not borne out by the facts proven. The magistrate testified that when these matters were brought to his attention, and he was solicited by Mr. Goodwin to issue a warrant, he stated that it would be necessary for some evidence to be produced which would justify issuing the same; that later defendant came before him, accompanied by Mr. Goodwin and an officer, and stated that he was willing to make an affidavit, whereupon the magistrate prepared an affidavit, asking defendant particularly for the data from which to make it and the date on which he claimed the offense was committed; that he drew up the affidavit according to such statements made by defendant, and defendant signed and swore to it. This affidavit was the cause and foundation of the prosecution. He is not shown to have made affidavit to any other offense or manifested his willingness to do so.

The claim that a verdict should have been directed in defendant's favor for the reason that plaintiff admitted facts which show he is guilty of violating the local option law is not tenable. His testimony, on cross-examination, which it is claimed was such an admission, related to an entirely distinct transaction

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from that involved here. At the worst, it was a different offense, at another time and place. Counsel devote much space in their briefs to the question of whether the facts plaintiff admitted would constitute a violation of the liquor law, under *People* v. *Driver*, 174 Mich. 214 (140 N. W. 515). This we regard as immaterial. The evidence was admitted. Defendant had the benefit of it before the jury. It may be considered admissible as bearing upon plaintiff's character and veracity and, if known to him, defendant's good faith; but proof of other similar offenses is not competent to directly prove guilt of the offense charged. 26 Cyc. p. 94; *Patterson* v. *Garlock*, 39 Mich. 447; *Wilson* v. *Bowen*, 64 Mich. 133 (31 N. W. 81).

Defendant requested the court to "instruct the jury that the discharge at the examination is not evidence of probable cause." This the court did not give, and manifestly should not have given in the form presented, but did in effect, we think, instruct the jury that the discharge was not to be considered as evidence of want of probable cause, distinctly charging them that it was admitted solely for the purpose of proving the one essential fact that the prosecution was terminated in the discharge of defendant, and what the justice may have thought in so doing was not for the jury to consider, emphasizing at length the rule putting the burden of proof upon plaintiff to establish, by a preponderance of evidence, that defendant was not only actuated by malice but had no reasonable ground or probable cause to think plaintiff guilty, and that plaintiff could not recover "if he has not done that to the satisfaction of the jury, by a preponderance of the evidence." We think the charge of the court as an entirety was correct, and very clearly stated to the jury the principles of law involved, and under the law their duty in relation to

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the issues of fact. As before suggested, the paramount problem for the jury was the veracity of the contending litigants. This they have solved in plaintiff's favor, to the extent of six cents. We are not impressed that the verdict is so against the overwhelming weight of evidence as to demand that it should be set aside for that reason.

No reversible error is found in the record, and the judgment is affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

JANIK v. FORD MOTOR CO.

1. AUTOMOBILES—LICENSE TAG AS EVIDENCE.

Evidence, not in dispute, that the defendant, an automobile manufacturer, sold a car to a purchaser in the regular conduct of its sales business, and, following a custom, permitted the buyer to use its license number in driving through the city, and that defendant furnished for him, at his request, a chauffeur, who was one of the regular employees of the defendant, to drive the car in the city, *held*, not to charge the defendant with liability to a pedestrian injured by the negligent act of the driver of the automobile which had been paid for in cash and had become the property of the buyer, who was also an experienced driver.[1]

2. SAME—MASTER AND SERVANT.

An employee of one person may become the special servant

[1] On the question of the liability of an automobile owner for negligence of chauffeur furnished by third person, see note in 39 L. R. A. (N. S.) 933.

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of another with all the mutual rights and obligations of master and servant for the time of, and with respect to, the special service in which he is temporarily engaged. The test is whether the servant becomes subject to the direction of the person to whom he is lent or hired, or remains under the control of his original employer.

Error to Wayne; Murphy, J. Submitted April 7, 1914. (Docket No. 2.) Decided June 1, 1914.

Case by Jan Janik against the Ford Motor Company for personal injuries. Judgment for defendant upon a verdict directed by the court. Plaintiff brings error. Affirmed.

Clarence P. Milligan, for appellant.

Thomas M. Cotter (Edward Donnelly, of counsel), for appellee.

STEERE, J. This action was brought to recover damages for personal injuries alleged to have been sustained by plaintiff, on July 29, 1910, from a passing automobile driven by an employee of defendant, while alighting from a Michigan avenue street railway car in the city of Detroit. From a judgment on a directed verdict for defendant plaintiff brings this case here for review on a writ of error. The controlling question involved is whether the relation of master and servant existed between defendant and the driver of the automobile at the time of the collision.

The uncontroverted facts essential to this inquiry are substantially as follows: On the day in question John I. Werner of Bronson, Branch county, Mich., went to the city of Detroit, purchased and paid for an automobile at the salesrooms of the Ford Motor Company on Jefferson avenue. He was in the hardware business at Bronson, and handled automobiles under what is called a limited dealer's license contract with

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defendant, by the terms of which he could purchase its cars at a discount for resale. He was accompanied to Detroit by a prospective purchaser named Kline, to whom he expected to sell the car. He proposed to drive the car to Bronson and deliver it to Kline, whose home was near by. He had owned and driven automobiles, was an experienced driver, and had driven several kinds, including a Ford, making long trips with them. He had owned and driven a Ford at least two years before the time in question. After purchasing the automobile and paying for the same in full, he also purchased and paid for gasoline, oil, and carbide for the drive to Bronson. Upon the car was a card marked with the license number registered for the Ford Motor Company for the year 1910, under the Michigan motor vehicle law. Having fully completed his purchases and preparations for the journey, and when about to leave, accompanied by Mr. Kline, he asked the salesman from whom he had purchased the automobile if they would let him have a driver to take them to the city limits; and the salesman replied that he would see. Werner testified that though he was a competent driver himself, he was not familiar with city driving in the congested streets, and for that reason asked for a driver to go with and pilot him to the city limits; that he had made this request before when he drove cars through to Bronson, and as a matter of accommodation they had sent a driver with him, and on reaching the city limits he would himself take the car and go on. A man by the name of Groholski was furnished, and they started on the journey with him as driver.

Groholski was a regular employee of defendant, having been in its service for some time as a repair man, tester, and demonstrator. His instructions from Walker, the foreman at the salesrooms, were to put on his coat, get into the car, drive it for the two

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gentlemen out to the city limits, turn the car over to them, and then come back on the street car. The three men got into the car about the same time, Werner sitting upon the back seat and Kline by the side of Groholski, to whom Werner said that they wanted to go over Michigan avenue. They proceeded westerly along Michigan avenue, and when near its intersection with Thirty-fourth street a street car overtook and passed their automobile, which was running along the avenue on its proper side of the track at a speed of from 10 to 15 miles an hour. As the street car neared Thirty-fourth street it commenced to slow down, to make a stop at the corner, and the automobile began to gain upon it. Plaintiff was a passenger upon the street car, and in alighting at Thirty-fourth street was struck by the automobile and injured, to what extent is a matter in dispute, as are also the circumstances surrounding the accident. He was thrown down, but not run over, by the automobile, which made a sudden stop. He was then assisted to his feet by the driver, taken into the automobile and driven to his home, where he walked without assistance from the car to the house. The questions of negligence, contributory negligence, and the extent of his injuries, which were closely contested, are but indirectly involved, and need not be further considered, as a verdict was directed on the ground that the driver was not defendant's servant, at the time of and in connection with this transaction. The limited dealer's license under which Werner bought this car provided for the delivery by defendant of cars f. o. b. at Detroit. Werner was required to pay cash for the same. He could then have the cars shipped by rail, he paying the freight, or could get them at defendant's salesrooms and drive them to Bronson, thus saving the freight. In this case he adopted the latter course. The records of the defendant show that the

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car was sold, paid for, and delivered to Werner at the salesrooms.

It was shown to be the custom of defendant to mark its license number on pasteboard tags and put them on cars, having as a manufacturer but one regular license number on a metal plate issued by the State. These tags were sometimes left upon the cars when sold and driven away, if the purchaser wished, until he could secure a license for himself from the secretary of state, which sometimes took two or three days. Under this undisputed evidence the fact that defendant's number was on a tag attached to the car when Werner took it away raises no inference against his ownership and control. *Burns* v. *Paint Co.*, 152 Mich. 613 (116 N. W. 182, 16 L. R. A. [N. S.] 816).

It is contended by plaintiff that Groholski was not the servant of the purchaser of the car when the accident occurred; but of defendant, his regular employer; that he was acting under orders of his employer within the scope of the customary duties for which he was hired and paid; that in carrying out the orders of defendant he had charge and control of the car, did not know Werner, and took no orders from him, was solely engaged in the work of his general employer, and not that of another; that though Werner may have had the benefit of his work, the servant was in no sense transferred to him or put under his control.

It is the claim of defendant that under the undisputed facts Groholski, though a general servant of and regularly in defendant's employ, was temporarily loaned to Werner, to do work for him and not for defendant, and for the time being was working for and as the servant of Werner, who became the special master and responsible for Groholski's acts in relation to the particular service he was then rendering. The rule is long settled that a servant in the general

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employment of one person may also become the special servant of another, with all the mutual rights and obligations of master and servant between them for the time of, and in relation to, the special service in which the servant is temporarily engaged. If an employer loans a servant to another for some special service, the latter with respect to that service may become liable as a master for the acts of the servant without any actual contract of employment between them or payment for service. Text-book authority, borne out by abundance of cited decisions, shows this is old doctrine. 1 Labatt on Master and Servant, § 52; 1 Bailey on Personal Injuries (2d Ed.), § 25; 26 Cyc. p. 1519; Shearman & Redfield on Negligence (6th Ed.), §§ 160, 160*a*, 161.

Counsel for the respective parties seem practically in harmony upon the rule by which the question involved should be tested, but widely at variance in applying the test. The essence of the best considered cases upon the temporary loan, or hire, of a servant for a special purpose is thus well stated in 26 Cyc. p. 1522:

"A person who avails himself of the use, temporarily, of the services of a servant regularly employed by another person may be liable as master for the acts of such servant during the temporary service. The test is whether in the particular service which he is engaged or requested to perform he continues liable to the direction and control of his original master or becomes subject to that of the person to whom he is lent or hired, or who requests his services. It is not so much the actual exercise of control which is regarded, as the right to exercise such control. To escape liability the original master must resign full control of the servant for the time being, it not being sufficient that the servant is partially under control of a third person. Subject to these rules the original master is not liable for injuries resulting from acts of the servant while under the control of a third person."

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One of the important considerations involved in this class of cases is the ownership of the equipment, appliance, or instrumentality with or in relation to which the temporary service, out of which the alleged injury arose, is performed. If it be the property of the general master who has loaned or hired the servant, there is a stronger reason, followed by a greater presumption, that he should and would retain in whole or in part the control and right to dictate and direct its use in carrying out the work. While not always controlling, this has often been recognized as sufficient to turn the scale in otherwise doubtful cases, particularly in that line of special service relating to transportation, or carrying of persons and property.

In the case of *Joslin* v. *Ice Co.*, 50 Mich. 516 (15 N. W. 887, 45 Am. Rep. 54), strongly urged by plaintiff as controlling here, the general employer owned the team and wagon which inflicted the injury complained of, and had hired the same, with a driver, for the day to an independent contractor. The court held, citing the English case of *Quarman* v. *Burnett*, 6 M. & W. 499, that the owner of the team and general employer was the responsible master of the wrongdoer, being the "owner of the horses, and not any one at whose service the horses and driver were temporarily placed." Of the *Quarman Case* the court said that, whether correctly decided or not, it had been too generally recognized and followed to be questioned now, citing numerous English cases regarded as quite analogous to the case then under consideration. It is well pointed out by the trial court that these English cases, upon which the *Joslin Case* is based, have been later so interpreted as to distinguish them and the cases based upon them from the instant case. In *Jones* v. *Scullard*, 2 Q. B. Div. (1898) p. 574, in analyzing the previous English cases mentioned, Chief Justice Russell said:

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"The principle, then, to be extracted from the cases is that, if the hirer simply applies to the livery-stable keeper to drive him between certain points or for a certain period of time, and the latter supplies all necessary for that purpose, the hirer is in no sense responsible for any negligence on the part of the driver. But it seems to me to be an altogether different case where the brougham, the horse, the harness, and the livery are the property of the person hiring the services of the driver."

Counsel for plaintiff refers to these English cases as being "musty with forgotten lore," and certain of the conclusions in them reached, as pointed out by Labatt, through resort to what an eminent English judge described as "desperate refinements." Be that as it may, the *Joslin Case* from this court, upon which counsel relies, was committed to and based upon one of the earliest English, so-called, "carriage cases," which the English courts interpreted, as above stated, in 1898. In the case of *Perkins* v. *Stead*, 23 Times L. R. 433, following the reasoning of *Jones* v. *Scullard*, *supra*, it was held that the servant of the vendor lent to the purchaser of an auto car, to drive it to a certain point was in that service the servant of purchaser. Stead purchased and paid for a motor car in London from a dealer who agreed in that connection to provide a driver to take the car to a certain place outside the city. Stead, when making the purchase, was accompanied by his son and his own driver, who was not experienced in driving the class of car purchased, nor familiar with the locality. While the car was being driven through the streets of London by the driver the dealer had furnished, defendant, his son and driver being in the car, a collision occurred with a bicycle, as a result of which the party injured brought an action against Stead for damages. It was held that, though the driver was the general servant of the vendor, yet at the time of the accident

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he was under the control of defendant in the service which he was rendering in relation to property which defendant owned and was in possession of, and therefore defendant was liable for the driver's negligence. That case presents an element of uncertainty not found in the instant case in the particular that there the record indicates the vendor's agreement to furnish the driver to take the car through London was an element in the negotiations of purchase and sale, while here the subject was not mentioned until after the purchase was consummated.

Plaintiff's counsel cites and urges as controlling *Dalrymple* v. *Motor Car Co.*, 66 Or. 533 (135 Pac. 91), another automobile case, also similar in many of the circumstances and relations of the parties to the one under consideration. In that case a customer named Dunham purchased an automobile from the defendant, a dealer in the city of Portland, and was furnished a driver named Harrington to take it from defendant's garage to the suburbs of the city. Dunham accompanied the driver, and while they were on the way, the car being driven by Harrington collided with a boy and injured him. In an action against the motor car company for the driver's negligence it was held that the question of whose servant he was became, under the testimony, an issue of fact for the jury, chiefly on the question of delivery and assumed obligation of defendant to instruct Dunham in the use of the car. It was shown that when Dunham negotiated the purchase he was inexperienced in driving, and it was therefore arranged that the car purchased by him should remain in possession of the dealer until Harrington, a demonstrator in its employ, instructed him in its use. Harrington had given him some instructions in running the automobile two days prior to the accident. On the day of the accident he called for it, having decided to take it away. The head sales-

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man instructed Harrington to take the car through the populous part of the city to an outskirt called East Portland, as Dunham was yet inexperienced as a driver, and there let him take charge of it himself. Harrington testified that Dunham was not a competent or experienced driver, and that his object in going with Dunham that morning was—

"Simply to take the car through the city and to get him over on the east side, out of town, where he could go from there by himself, because I refused to let him drive through town alone."

The court, in a somewhat exhaustive opinion, considers and reviews many of the leading authorities upon the questions involved, apparently with approval, recognizing the rule that the test is not so much the exercise of the power of control as the right to exercise such power; states that under the circumstances of this case it can well be contended that Dunham did not have a right to control Harrington in the operation of the car and says:

"Whether the owner, who is conceded to have known little or nothing about running the car, was with the driver while passing through that part of the city, or was to meet him at the place where it was intended that the owner should take charge of the car, would make but little difference. * * * Were it necessary for the act of the chauffeur Harrington to be defined, we would say that the service performed by him for the company on the morning of the accident was of much the same nature as the operation of the car for the purpose of demonstration or instruction. * * * The evidence tended to show * * * that the company undertook to perform the service as a part of the transaction, in connection with the sale of the automobile, as a part of its general business and in furtherance of the same; that Harrington, the servant, was doing the work for his master, the company, and not for himself, nor on his own account, nor as a mere favor to the purchaser; that it was as much a part of the general business of

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the company as though it had been performed prior to the time of the purchase of the car."

In the instant case there was no agreement or suggestion, as a part of the negotiations and purchase, that the motor company should assume, or undertake, any instructions to the purchaser relative to operating the car, or to see that when it left the salesrooms it was properly run for any length of time, or to any place. He was a dealer in cars himself, experienced in their use, and knew what was necessary. The deal was closed, he had his receipt, and the car had been delivered to him at the time he asked for the accommodation. Groholski was sent along to drive as a "mere favor to the purchaser." At the time of the accident Werner, an experienced driver, not only owned the car but was in actual occupation and possession of it, riding with a prospective purchaser out from the city towards their homes. He was in no sense helpless, looking to, and dependent upon, the driver, as would be the case of an inexperienced purchaser. Like many other experienced drivers from the country or small towns he felt less confidence in driving through the congested thoroughfares of a large city, and for that reason asked the loan of a driver to the suburbs. The fact that he found no occasion to give instructions to the driver, except to tell him along what street to drive, and relied upon his skill and experience, in no way affected Werner's absolute right to control him in everything he did in connection with the car. *Samuelian* v. *Machine Co.*, 168 Mass. 12 (46 N. E. 98). Under the undisputed testimony, the motor company had no control over nor interest in the car after it left its salesrooms, nor in the manner in which it was run, nor in where it went. It could not dictate how the car should be run; the most it could do would be to recall from this special employment the servant it had loaned. Dur-

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ing Groholski's absence from the salesrooms in this service he was doing the work of Werner, to whom he was gratuitously loaned, on the initiative and request of Werner, who had full right to dictate as to his own property and direct in what manner the car should be operated. He unquestionably could have taken charge and driven it himself, if he saw fit at any time, and, if so disposed, could have discharged the driver and proceeded without him; he was therefore for the time being the special master.

The conclusion of law deduced by the trial court from the undisputed fact that Groholski was, at the time of the accident, the servant of Werner, whose automobile he was driving, and not of defendant, whose interest in and control over that instrumentality had ended, is sustained.

The judgment is affirmed.

McALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and MOORE, JJ., concurred.

HOLDEN *v.* HADLEY.

AUTOMOBILES—EVIDENCE—NEGLIGENCE.

Evidence, in an action for personal injuries, tending to show that the defendant's automobile collided with plaintiff who was riding on a bicycle, that defendant in operating his car turned the corner on the wrong side of the street intersection, and that he was driving at an excessive rate of speed, sustained a judgment for the plaintiff, although the defendant's evidence tended to dispute the claim.

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Error to Eaton; Smith, J. Submitted April 7, 1914. (Docket No. 5.) Decided June 1, 1914.

Case by Walter Holden against Adelbert Hadley for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Stewart & Jacobs, for appellant.

Rosslyn L. Sowers, for appellee.

MCALVAY, C. J. Plaintiff recovered judgment against defendant for personal injuries claimed to have been caused by defendant in negligently running over him in the highway with an automobile which defendant was operating. Defendant brings the case to this court for review and asks for reversal upon errors assigned.

The accident occurred in the city of Sturgis, Mich., at the intersection of Chicago and Nottawa streets. It is the claim of the plaintiff that, at the time of the accident, he was riding a bicycle westward on Chicago street, which runs east and west through Sturgis, on the right-hand side of said street about 10 feet from the curb, and was some distance east of the intersection of these streets when he noticed automobiles, with tops up, approaching from the west on the same side of said street in a direct line with him. He saw but two automobiles coming quite near to each other, one directly in line with the other. There was in fact a third automobile in the same line which he says he did not see. Plaintiff was riding at a speed of not more than six miles an hour. As the automobiles approached the intersection of these streets, the first turned north into Nottawa street and was immediately followed by the other. Both of these machines turned into said street at the right of its center line. Plaintiff had at that time gone west nearly to the middle

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of Nottawa street and, proceeding to cross immediately behind the second car, was struck by the third automobile, which was a 5-passenger 40-horse power touring car, weighing 2,500 pounds. This car struck him when he was nearly across Nottawa street. He was picked up about 8 feet from the sidewalk line of that street and about 15 or 20 feet north of the curb line of Chicago street. He says he did not discover the third car until the second car had gotten away from in front of it, and then he immediately turned his wheel to the north to avoid collision. When the collision occurred he was about in a line with the crosswalk on the right-hand side of Chicago street. He was struck by the fender over the left-hand front wheel of defendant's machine.

The negligence charged by plaintiff is that, in violation of Act No. 318, Pub. Acts 1909, defendant negligently operated his machine in the city of Sturgis at a higher rate of speed than 10 miles per hour, and also failed to keep his automobile to the right side of Chicago street, and at the intersection of these streets failed to keep to the right of the center of intersection of these streets. There was a dispute relative to both of these propositions. The facts were submitted to the jury, which found in favor of plaintiff.

The errors assigned and relied upon are that the declaration did not state a cause of action, and the court erred in receiving any evidence under it, also in overruling other objections to evidence, the refusal of the court to direct a verdict for the defendant on the ground of contributory negligence of plaintiff, in refusing to give certain requests of defendant, and upon exceptions to certain portions of the charge of the court.

An examination of the declaration shows that the claim of defendant that there is no negligence charged, and that there is no allegation that plaintiff

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was exercising due care and was without negligence on his part, is not sustained. The case was tried upon the second count of plaintiff's declaration, and it contains sufficient allegations of a violation of the statute in driving on the left-hand side of the road at an excessive rate of speed into Nottawa street on the left of the center and negligently turning, contrary to statute, and also as to due care exercised on plaintiff's part. No error was committed in refusing to direct a verdict for defendant.

Several errors are assigned upon the admission of evidence permitted by the court. These have been examined, and we do not find that any error was committed by the court in receiving such testimony.

Errors are assigned upon the refusal to give five requests of defendant. These requests asked for a directed verdict in favor of defendant and related to the contributory negligence of plaintiff. The court was not in error in refusing to give them as they were not adapted to the evidence in the case. The court correctly charged the jury upon the question of contributory negligence of plaintiff and upon the law applicable to the case. Defendant can have no cause to complain that this charge was unfavorable to him.

The theory of the plaintiff was that defendant was driving his automobile unlawfully at a high rate of speed behind the other automobiles on the wrong side of the highway and, turning into Nottawa street as close as possible to the left-hand side of said street, could not be seen by plaintiff until after the other machines had passed into Nottawa street, when it was too late to avoid a collision.

Upon the disputed questions of fact, the jury found against the defendant. Such finding was supported by the great weight of the evidence in the case, and the amount of the verdict is not claimed to be excessive. In his charge the court refused to allow a re-

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covery for the bicycle, which was not plaintiff's property, and limited the plaintiff's damages to the value of his loss of time, expenses incurred for medical attendance and medicines, caring for and treating his injury, and compensation for his pain and suffering, but excluded recovery for care given to him by his wife.

We find no reversible error in the case. The judgment of the circuit court is affirmed.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

DUFFY *v.* CHARTERS.

1. PHYSICIANS AND SURGEONS — MALPRACTICE — EVIDENCE—HYPOTHETICAL QUESTION.

   In an action against a physician for malpractice, the trial court did not err in permitting plaintiff's counsel to ask of a medical witness whether the treatment, which plaintiff's evidence disclosed was adopted, was a proper method, although defendant's witnesses denied that such method was used and claimed other treatment was employed, and their claims were not included in the hypothetical question.

2. SAME—PLEADING—VARIANCE.

   Under plaintiff's declaration, alleging that the defendant neglected to use proper skill and care in setting plaintiff's collar bone and broken clavicle, and failed to bring the ends of the bones in apposition and to employ proper means for placing and keeping them in position so that the shoulder and said bones became deformed, diseased, that the bones were allowed to overlap, etc., evidence

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that a fibrous union of the bones resulted was not a fatal variance and tended to support the declaration.

3. SAME—DAMAGES—PAIN AND SUFFERING.

Plaintiff was also entitled to recover damages for extra pain and suffering which he may have sustained because of the improper treatment, but he was not entitled to recover for the discomfort and pain which would in any event have resulted from the broken bone under proper treatment.

Error to Charlevoix; Mayne, J. Submitted April 8, 1914. (Docket No. 7.) Decided June 1, 1914.

Case by Matthew Duffy against John Charters for malpractice and negligence in treating injuries of plaintiff. Judgment for plaintiff. Defendant brings error. Affirmed.

A. G. Urquhart (J. M. Harris, of counsel), for appellant.

Mesick & Miller, for appellee.

KUHN, J. The plaintiff was employed as a common laborer by the city of Boyne City to work in the construction of sewers, and on August 30, 1910, he was injured by the caving in of the earth while engaged in this work. The defendant, a regularly licensed physician and surgeon in the general practice of medicine and surgery in Boyne City, was called to the plaintiff's residence, and found him suffering from an oblique fracture of the left clavicle. It is the claim of the plaintiff that the defendant did not reduce the fracture properly; that there has been no proper union of the bone; that there has been a shortening of the bone; and that, as a result, the use of his arm is greatly impaired. A suit for malpractice was brought, and a verdict and judgment for $1,080 was had. Defendant brings the case to this court by writ of error.

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The first contention argued by defendant's counsel in his brief is that the court erred in overruling defendant's motion for a directed verdict, and it is insisted that there was no question of fact to submit to the jury. The plaintiff's claim is, and he supported it by his own testimony and that of two others who were present, that when the defendant came to the house all he did was to pick up plaintiff's arm and place it diagonally across plaintiff's breast so that the points of the fingers of the left hand were against the lower part of the right shoulder, above the armpit and below the top of the shoulder; that thereupon he applied bandages, which the defendant claims was done in the approved method known as Sayre's dressing, but, it is claimed by plaintiff, was not done as Sayre's method requires. Whether the defendant was negligent in that he did not use a proper method in reducing the fracture presents the question in issue in this case.

The following hypothetical question was asked of Dr. Shaver, a witness produced on behalf of the plaintiff:

"If a man 52 years of age was injured by the caving in for a sewer in which he was working, and taken directly to his home and within an hour from the time of the injury a doctor was called and diagnosed the injury as a broken clavicle of the left shoulder, and thereupon proceeded to reduce the fracture by placing the left forearm diagonally across the breast in such position that the ends of the fingers of the left hand reached the front of the right shoulder between the armpit and the top of the shoulder, the ends of the fingers reaching the shoulder joint, and securing the arm by means of bandages, would this treatment properly reduce the fracture and secure a union of the fractured ends of the clavicle, in your opinion?

"*A.* In my opinion, no."

This hypothetical question is based upon what the lay witnesses testified was done by the defendant

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when he put on the bandages. It is urged that the question is incomplete, and so insufficient as to have no value in assisting the jury in determining the defendant's responsibility. The question does not contain what the defendant claims he did in reducing the fracture, but does state substantially what plaintiff claims he did, as testified to by the witnesses present. Dr. Marshall described the proper method to be used in reducing such a fracture, as follows:

"In reducing the fracture and overcoming the deformity present in the case of a fractured clavicle, we have the shoulder pulling the outer fragment down and the muscles of the chest pulling it in. These two forces must be overcome by some method of lifting up the shoulder and pulling it outward to overcome the muscles in the chest that are bringing it in. The particular method may vary. Personally, I have them sit in a chair and have an assistant pull back the shoulder while I put on the dressing, or some form of retentive apparatus is usually applied, and that varies with the particular surgeon's wishes. Some use one form and some another. No matter what method is employed, the object to be attained in order to get the bones in apposition is to overcome the tendency of the muscles to draw the shoulder inward and the weight of the shoulder to hold it down. It is necessary, in order to get the bones in apposition, that the tendency of the muscles to draw the shoulder inward and the weight of the shoulder to hold it down be overcome. The clavicle acts as a brace, and when the brace is broken the shoulder swings forward. The ends then override or pass each other, if it is a complete fracture. It is necessary to get the ends of the bone together, and to do that, the shoulder must be put back there. And no matter what system is used, all systems must get the ends of these bones together, and under the circumstances, they can't come together unless the shoulder is held back or put back. When the shoulder is placed back and the bones are nearly in apposition as the physician can get them, then the immediate problem is to hold the shoulder there. In order to do that some kind of retentive apparatus is used. In Sayre's method the idea is to fasten the arm

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back and lift the elbow. One strip is put on the arm and attached to the back, and then, using that as a fulcrum, the point of the elbow is brought forward by another piece of plaster and passed over the shoulder."

The testimony of the experts being based on the testimony of plaintiff's witnesses, it was proper to have their answers stand. The question of the value of their evidence and that of the other witnesses for plaintiff was for the jury, and was properly submitted by the trial court. *Fye* v. *Chapin*, 121 Mich. 675 (80 N. W. 797).

It is contended that there is a fatal variance between the declaration and the attempted proof of a want of proper union of the broken ends of the plaintiff's clavicle. The declaration charges:

"The said defendant then and there so negligently, carelessly, and unskillfully behaved and governed himself, in and about the care of said plaintiff, and in and about the setting, treatment and care of said collar bone or clavicle, disrupted, fractured, wounded, and bruised, in not properly setting the same, and not using the proper care, attention, medicaments, appliances, and skill in the treatment of said collar bone or clavicle, that by and through neglect, carelessness, default, and the unskillfulness of said defendant, as such physician and surgeon, the said plaintiff was, and still is, caused to suffer great and excruciating pain in his shoulder, and his said shoulder was caused to become greatly swollen, inflamed, and diseased, to an unnecessary extent, and the bones so disrupted, broken, fractured, wounded, and bruised, were caused and allowed to override and overlap, and the said shoulder to become greatly deformed and diseased, and does still so remain, and the general health of the said plaintiff greatly impaired, weakened, and ruined; * * * yet the said defendant did so negligently, unskillfully, and carelessly treat the said plaintiff that by reason of his neglect, unskillfulness, and carelessness, and by reason of his failure to put the bone or bones of said shoulder properly in apposition, and to use the proper means for so placing and keeping said bones in apposition, and by reason of his

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failure to use the proper appliances, at the proper time, in the treatment of said shoulder, and also by reason of the gross neglect and inattention of the said defendant in not thoroughly examining and properly treating the shoulder of said plaintiff, his said shoulder became useless and diseased, and is left uncured," etc.

It is the plaintiff's contention that the false or fibrous union shown by the proofs is the natural result of imperfect apposition, as set forth in the declaration, and that it was therefore not necessary to specifically allege it. This is supported by the testimony of the physicians, who testified that the first step in the treatment of such a fracture is to get the ends of the bone together and keep them there, if possible, and, unless this is done, no perfect union results. We think the declaration was sufficient to warrant receiving this evidence, under authority of *Groat* v. *Railway*, 153 Mich. 165 (116 N. W. 1081), and cases cited therein.

Complaint is made that the court erred in submitting to the jury the question of compensation for extra pain and suffering. With reference thereto the court said:

"For the pain and suffering which the plaintiff would have actually sustained by reason of this broken clavicle and its treatment, if properly treated, he cannot recover in this case, because the defendant is not responsible for that; that he had to sustain anyway. But for the pain and suffering which was extra, if any, which was caused by the defendant, plaintiff can recover, and only so much as was caused by defendant, that which has already been sustained by him, and that which he will sustain in the future, if you find that he will sustain pain in the future. You will see that it is any extra pain and suffering which he would not have sustained had it been correctly treated for which he can recover."

Under the issue in this case, it was entirely proper to submit this question to the jury.

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We have examined the other assignments of error, but find them without merit. The learned trial judge submitted the case to the jury in a careful charge, and, finding no prejudicial error in the record, the judgment of the trial court is affirmed.

MCALVAY, C. J., and BROOKE, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

GATES *v.* SEBALD.

EASEMENTS—ADVERSE POSSESSION—PARTNERSHIP — JOINT OWNERSHIP—STAIRWAYS.

Where partners owned two store buildings with a stairway between, and, on dissolving partnership, they divided the property into two parcels, reserving to each the use in common of the intervening hall and stairway, they created a mutual easement in the land occupied thereby, so that the use of the premises was permissive, not adverse, and neither party could gain title by adverse possession.

Appeal from Lenawee; O'Mealey, J. Submitted April 10, 1914. (Docket No. 20.) Decided June 1, 1914.

Bill by Julia M. Gates and others against M. G. Sebald and another for injunction and other equitable relief. From a decree for defendants, complainants appeal. Affirmed.

Fellows & Chandler, for complainants.

Willard M. Cornelius and *B. L. Hart,* for defendants.

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MCALVAY, C. J. Complainants filed this bill claiming to own a certain strip of land in the village of Morenci, Lenawee county, Mich., next adjoining on the east to the premises of defendants, where defendants were proceeding to erect a certain building, and to make excavations for the basement walls and foundations of such building, whereby they were encroaching 2 feet upon complainants' premises, who seek to enjoin such encroachment and trespass and establish their title to such strip of land. A temporary injunction was issued according to the prayer of the bill. Defendants answered, denying complainants' right and title to the strip of land in question. An issue was joined, and a hearing of the cause had before the court, which resulted in a finding and decree that complainants had "not sustained their claim of title by adverse possession to" the strip of land 2 feet in width in dispute, and dismissed the bill of complaint, with costs to defendant. Complainants have appealed from such decree.

The material facts in the case, except the matter of adverse possession of this strip of land by complainants, are not in dispute. The facts necessary to be stated are that these adjoining properties are located in the village of Morenci, fronting on Main street, which runs east and west; the west line of the west lot being the east line of North street, which runs north and south. The size of the two parcels of land is 48 feet fronting on Main street and 60 feet in depth along North street.

The two buildings, which were erected years ago on this entire description, were destroyed by fire in the year 1912. The westerly building, which fronted on Main street, and the west line of which extended 60 feet along the east line of North street, is known as the Mace building, and was built in 1855 upon the west half of the above description. This building was 22 feet wide on Main street. The lot was 24 feet wide.

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A narrow stairway occupied the east 2 feet, by means of which access was had to the second and third stories.

The building on the east was built by Mr. Gates, from whom the title of complainants is derived, about two years after the Mace building. The east line of defendants' east wall extended to the east line of this property. Defendants' west wall was built 22 feet from its east line, built of brick 8 inches thick from the foundation in the basement to the ground floor, and from the ground floor to the roof each story of it was built of studding 8 inches thick, covered with lath and plaster.

The 4 feet between the east wall of the Mace building and the west wall of the Gates building was occupied by a stairway, the foot of which began about 15 feet back from the front entrance on Main street to the landing on the second floor, and from this landing the second flight ran to the third floor landing, which extended back to the north wall of the building. This stairway was built for the use of all the tenants who occupied the second and third floors of both buildings, which were each three stories high, with a basement. The roof and front and rear walls of the Gates building extended to and joined the east wall of the Mace building.

These buildings, at or about the time the Gates building was constructed, became the property of and were occupied by a copartnership, known as W. R. Gates & Co., which consisted of William R. Gates, Waddell A. Mace, and George Acker, Jr. The basement in both buildings and the first floors were occupied by said firm in the conduct of their business, and the second and third floors were occupied by their tenants continuously from that time until the dissolution of said partnership, which occurred in 1872. When the partnership was dissolved, this property was acquired by two of the partners by deeds dated

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November 23, 1872, by which Mr. Mace took the west 24 feet and Mr. Gates the east 24 feet of these premises, with the written condition in the deeds to each of them that the hall and stairway on the east side of the premises deeded to Mr. Mace and the west side of the premises deeded to Gates were to be used in common and kept in repair by the owners thereof. The record shows that, from the time the second building was built, in the year 1858, up to the time the buildings were destroyed by fire, in 1912, this hallway and stairs between the buildings were so used, occupied, and kept in repair by the owners.

Complainants claim title by adverse possession to the east 2 feet of defendants' lot, except the south 15 feet of said strip, claiming that they and their predecessors in title have for many years last past been in the open, exclusive, and hostile possession and occupancy of the same, to the exclusion of all other persons; that in the basement they have occupied all of said strip up to the east basement wall of the building which stood upon defendants' land, and in like manner have occupied for the same length of time the space under the stairway on the ground floor; and that by such adverse user have acquired title thereto.

On the part of defendants it is contended that, during all the time that complainants claim to have been acquiring this strip of land by adverse possession, it has all been occupied and used by defendants' predecessors in title continuously and jointly with complainants, without interruption, and that the occupation of the same by complainants has not been and could not be a hostile and adverse possession.

The record shows, as already stated, that when the copartnership of W. R. Gates & Co. was dissolved, this property which was owned by them was divided, and deeds were duly executed, the west half to Mace, and the east half to Gates. Each of the deeds mentioned contained the following agreement:

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"With the understanding that the hall and stairway on the east side thereof is to be used in common, and that the stairs be occupied and repaired by the owners of the same."

The only difference in such agreements being that the deed to Gates of the east 24 feet of these premises describes "the hall and stairway on the west side of the premises."

Defendants in this case have succeeded, by different conveyances, subject to this same condition, to the premises deeded to Mr. Mace. Complainants are the successors in title to the premises deeded to Mr. Gates through his will. It is apparent that, by these conveyances made by the predecessors in title of both parties to this suit, an easement was created in the 4 feet of land occupied by this hallway and these stairs for the mutual use and benefit of the grantees in such deeds and their successors in title for the joint and mutual use of such hallway and stairs, and, as already stated, such joint and mutual use was continued until the buildings were destroyed by fire, in 1912.

The question arises whether either of the grantees in such deeds, or their successors, could acquire title to the 2-foot strip of land reserved in such deeds by adverse possession. The fundamental principle upon which adverse possession may be based is that it must be a hostile possession. It cannot be possible that any use or occupation of any portion of these strips of land by either of the parties under these deeds, while both were in the exercise of the rights given to them under this easement, could be or was hostile to the other. Such a condition is repugnant to the terms of the instruments under which they occupied. This is fundamental and axiomatic. Whatever use the complainants and their predecessors in title made of said disputed 2-foot strip was a permissive user. *Township of Jasper* v. *Martin*, 161 Mich. 341 (126

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N. W. 437, 137 Am. St. Rep. 508). In which case appears the following quotation from an opinion of Chief Justice Marshall:

"It would shock that sense of right which must be felt equally by legislators and judges, if a possession which was permissive, and entirely consistent with the title of another, should silently bar that title." *Kirk* v. *Smith*, 9 Wheat. (U. S.) 241, 288.

We concur in the opinion of the trial court "that the proofs in the case do not sustain the claim of title by adverse possession made by the complainants to the strip of land mentioned and described in the bill of complaint."

The decree of the circuit court is affirmed, with costs to defendants.

BROOKE, KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred. BIRD, J., did not sit.

MENARD v. CAMPBELL.

1. WILLS—HEIRS—CONVEYANCES—DEVISE.
   A devise to a person for life with remainder over to his heirs does not convey a title to the devisee in fee simple, since the rule of "Shelley's Case" is abolished in Michigan: 3 Comp. Laws, § 8810 (4 How. Stat. [2d Ed.] § 10650); the heirs derive title from the testatrix through the will.

2. SAME—DEEDS.
   The word heirs has a technical meaning, and as such describes those who succeed to the ownership of real estate upon the death of the owner.

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3. SAME—HUSBAND AND WIFE—ESTATES OF DECEDENTS.
Where, by statute, a married woman takes an absolute interest in the real estate of the deceased husband, the word heirs, as employed in a will, properly includes the widow.

4. SAME—MARRIAGE.
Where no intention appeared on the part of the testatrix to build up an estate in her family, and the will provided for an early final disposition of her estate by sale or absolute devise, except certain property to her sons for life, a devise of a life estate to one son and at his decease to the heirs surviving him in equal shares, vested title in his widow and a surviving child after his death, in equal shares.

5. ESTOPPEL—DEEDS—HUSBAND AND WIFE.
Since a married woman is not held liable on her covenants in a deed executed by herself and husband, in the absence of statutory provisions creating such liability, the wife was not estopped by a joint deed of conveyance with full warranties executed by herself and husband, so as to cut off the estate thereafter vesting in her under the will of the testatrix, and without testimony tending to disclose her purpose in joining in the conveyance, or that the consideration was paid to her, the signature of the wife was a nullity.

Appeal from Chippewa; Fead, J. Submitted April 15, 1914. (Docket No. 42.) Decided June 1, 1914.

Bill by Eugene Menard as executor of the estate of Harriet Lauzon, deceased, against Louise Nault Campbell for the construction of the will of decedent. From a decree for defendant, complainant appeals. Affirmed.

Warner & Sullivan, for complainant.

M. M. Larmonth, for defendant.

KUHN, J. The bill of complaint in this case is filed to obtain a construction of a clause in the will of Harriet Nault Lauzon, who died at Sault Ste. Marie, in this State, on the 28th day of June, 1897. The will,

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which was dated on the 21st day of April, 1897, contained the following clause:

"*Sixth:* I give, devise and bequeath to my beloved son, Joseph Honore Nault, and his heirs surviving him, as follows: To said Joseph Honore Nault the right to improve, let, or use and occupy as a home during his natural life, all that part of private land claim number 110 in said Sault Ste. Marie, Michigan, lying north of Portage avenue south of the water line of St. Mary's river and west of a line drawn parallel with the west line of Sova street and 96 feet distant west therefrom, and at his decease to his heirs surviving, the absolute title in fee to said premises, share and share alike."

Joseph Honore Nault, who was unmarried at the death of his mother, subsequently married. He died September 3, 1911, leaving surviving him his widow and one child, Genevieve H. Nault. On May 16, 1906, Joseph Honore Nault made a lease of the lands in question to the Union Carbide Company for 75 years; but the lease also provided that it was to terminate at his death. On the same day he made an absolute conveyance thereof by warranty deed to the same party, and in this conveyance Louise Nault joined as his wife. The complainant was appointed administrator of the estate of Joseph Honore Nault, deceased, and also guardian of the person and estate of Genevieve H. Nault, the said minor child. The complainant was authorized by the probate court to sell the property in question, which he did, for the sum of $6,000. While this proceeding was pending in the probate court, the defendant claimed to be an heir at law of Joseph Honore Nault, deceased, and entitled, under the clause of the will above set forth, to one-half of the proceeds of the sale of said lands. This suit was brought to determine the merits of this claim, and the circuit judge made a decree in favor of the defendant. Complainant appeals. The question therefore is: Is the defendant, or was she at the

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time of his death, an heir at law of Joseph Honore Nault, her husband, and, also, if she was, did she convey her prospective interest in the lands by the deed of May 16, 1906? The defendant contends that she became an heir at law by virtue of Act No. 286 of the Public Acts of 1909, which provides, in part, as follows:

"SECTION 1. When any person shall die seised of any lands, tenements or hereditaments, or of any right thereto, or entitled to any interest therein in fee simple, or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts, in the following manner:

"*First.* One-third to his widow and the remaining two-thirds to his issue, and if he leaves no widow then the whole thereof to his issue, and if all the said issue are in the same degree of kindred to the intestate, they shall share the estate equally, otherwise they shall take according to the right of representation;

"*Second.* If the intestate shall leave a husband or widow and no issue, one-half of the estate of such intestate shall descend to such husband or widow and the remainder to the father and mother of the intestate in equal shares, and if there be but one of the parents living, then to the survivor alone; and if the intestate shall leave no issue, husband or widow, his or her estate shall descend to the father and mother in equal shares, and if there be but one of the parents living, then to the survivor alone; and if the intestate shall leave no issue, father or mother, his or her estate shall descend, subject to the provisions herein made for the widow or husband, if a widow or husband survive the deceased, to his or her brothers and sisters and the children of deceased brothers and sisters, and if such persons are in the same degree of kindred to the intestate, they shall take equally, otherwise they shall take by right of representation: *Provided, however,* if such intestate shall die under the age of twenty-one years and not having been married, all the estate that came to such intestate by inheritance from a parent, which has not been lawfully disposed of, shall descend to the other children and the issue

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of deceased children of the same parent, if there be such children or issue, and if such persons are in the same degree of kindred to said intestate they shall take equally, otherwise they shall take by right of representation."

The claims of the complainant are stated as follows:

"That Act 286 of the Public Acts of 1909 does not operate to make the widow an heir of Joseph Honore Nault for the reason that, under said act, the widow becomes an heir only when the husband dies seised of lands or an interest therein in fee simple or for the life of another; that such was not the instant case, because Joseph Honore Nault had merely a life estate in the premises, and, because of the lease and the conveyance given by him to the Union Carbide Company, he had conveyed his whole estate, and had no interest whatever in the property at the time of his death. That it appears from the will that the testatrix intended the estate to inure to the benefit of her immediate family only."

The circuit judge has given us the benefit of a written opinion, which states his conclusions as to these questions, and with which we agree. We therefore incorporate them as a part of this opinion:

"By virtue of the provisions of section 8810, Comp. Laws 1897 (4 How. Stat. [2d Ed.] § 10650), abolishing the rule in *Shelley's Case*, the word 'heirs' as used in the will is a word of purchase to designate the persons who are to take the estate upon the death of the life tenant. It is not a word of limitation to define the estate. The heirs do not take by inheritance from Joseph Honore Nault, nor do they acquire any title through or by virtue of his right of possession. Their title is derived entirely from the testatrix by virtue of the provisions of the will. Consequently the disposition made by Joseph Honore Nault of his life estate becomes unimportant.

"The will expressly defines the estate to be taken, a remainder over after an estate for life, and designates the persons who are to take the remainder, but by a generic term. It requires no construction to

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ascertain the estate. It requires construction only to determine the particular persons who belong to the designated class. Who are the heirs of Joseph Honore Nault, surviving him?

"It is assumed by both the parties hereto that the heirs of Joseph Honore Nault must be ascertained as of the time of his death, rather than of the time of the death of the testatrix. This assumption is in accordance with both the principles of law and the intent of the testatrix as expressed in the will.

"The word 'heirs' has a technical meaning, and as such it describes those who succeed to one's ownership of real estate on his death. *Fullagar* v. *Stockdale,* 138 Mich. 367 [101 N. W. 576]; 2 Blackstone's Comm. 201 (Cooley's); *Bailey* v. *Bailey,* 25 Mich. 188.

"Where by statute, the husband or wife takes an absolute interest in the estate of the deceased consort, they come within the technical definition of 'heirs.' 40 Cyc. p. 1463; *Turner* v. *Burr,* 141 Mich. 111 [104 N. W. 379]; *Proctor* v. *Clark* [154 Mass. 45, 27 N. E. 673], 12 L. R. A. 721.

"When the words, 'heir,' 'heirs,' 'unlawful heirs,' or the like are clearly used, not to define the estate given, but to designate the persons who are to take, whether heirs of the testator or of some other person, they mean the person or persons who would by law succeed to the real estate of the person named if he had died intestate, unless an intention to express a different meaning appears from the context of the will and the circumstances of the case. Rood on Wills, § 449.

"The statute of descent (Act 286, *supra*) designates the defendant and the child as the persons who would be entitled to succeed to any real estate, or interest therein, of which Joseph Honore Nault might die seised, in the absence of devise, and are therefore his 'heirs.' They are the persons who come within the class mentioned in the will, and are therefore entitled to the property in question, unless, from the will, it appears that such was not the intention of the testatrix.

"In construing the will, to ascertain the intent of the testatrix, the language of the will must govern.

"The intent is to be gathered from the language

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used, for the object of construction is not to ascertain the presumed or supposed, but the expressed, intention of the testator; that is, the meaning which the words of the will, correctly interpreted, convey.' *Allison* v. *Allison* [101 Va. 543, 44 S. E. 906], 63 L. R. A. 924.

"A will cannot be construed by mere conjecture as to the intention of the testator; but it is the intention which the testator expresses in his will that controls, and not that which he may have had in his mind. 40 Cyc. p. 1389.

"The plain intent of the testator as evinced by the language of the will must prevail. The intent must be gathered from the 'four corners of the instrument.' *Wales* v. *Templeton,* 83 Mich. 179 [47 N. W. 238].

"A careful examination of the will has failed to reveal to me the expression of any intention on the part of the testatrix that her property should inure to the benefit of her immediate family, to the exclusion of any of the legal heirs of Joseph Honore Nault.

"If we assume that the testatrix reviewed the then existing provisions of law relative to the descent of property and the determination of 'heirs,' and considered the different situations which might exist at the death of Joseph Honore Nault, we must conclude she knew that, in the event of his death married, but without issue, the widow and his brothers and sisters would be his heirs. By the use of the term 'heirs surviving,' the testatrix then must have known and intended that the widow of her son should, under such circumstances, take part of the property.

"If, on the other hand, we assume that the testatrix had in mind only the situation as it now exists, in order to hold that she intended to give all the property to the child, and to exclude the widow, it is necessary to apply some rule of construction or discover some language in the will which would warrant us in finding that she intended the 'heirs surviving' should be ascertained by the facts as they might exist at the time of the execution of the will or of the testatrix's death.

"I know of no rule which would justify such a construction, nor can I discover any language in the will which points to such an intention. The construction to be given, in my judgment, is that both the fact and

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the law as they existed at the time of the death of Joseph Honore Nault must control in determining his 'heirs surviving.' *Lincoln* v. *Perry* [149 Mass. 368, 21 N. E. 671], 4 L. R. A. 215; *Gray* v. *Whittemore, supra* [192 Mass. 367, 78 N. E. 422, 10 L. R. A. (N. S.) 1143, 116 Am. St. Rep. 246].

"This ruling, moreover, appears to be in full accord with intention of the testatrix as it may be gathered from the will.

"There is no indication of a desire to build up a landed property in the family. The will provides for the early final disposition of the entire estate, either by sale or absolute devise, except the descriptions in which the sons take their respective life estates.

"After providing for the support of her mother, and for her grandchildren in being, the testatrix divides the rest of her estate among her four children, the three sons and one daughter. While the value of the particular descriptions of land specifically devised does not appear, the whole tenor of the will indicates that it was the intention to give the children equal portions.

"She placed no restraint of alienation upon the estate given the daughter. By making him an executor and trustee under the will, the testatrix evinces confidence in the integrity and ability of her daughter's husband, which doubtless accounts for the absolute devise and bequest to the daughter, in whose hands, under the counsel and management of the husband, the mother felt that the property would be conserved.

"The unqualified disposition of the entire estate, except the life interests given the sons, and the unhindered devise to the daughter, would appear to negative the idea that the testatrix wished to keep the property in the immediate family, to the exclusion of any legal heir.

"For some reason, however, the testatrix deemed it expedient to restrict the control of the sons over their portions. The provision relative to their receiving only the income, or part of it, of their shares of the residue of the estate for ten years, and the one regarding the possibility of their not paying the taxes and insurance premiums on the property in which they had life estates, would seem to indicate that she

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did not have full confidence in their business ability, experience, or providence.

"In the event of the death of a son before the expiration of the ten-year period, his share of the residue, then converted into money, was to go to his heirs. The remainder over after the expiration of the life estate was to go to his heirs. In neither instance is there the expression of any restriction as to whom such heirs should be.

"It was the evident purpose of the testatrix to divide her estate equitably among her four children; but she felt it necessary to restrict the power of each of the sons to dispose of his share, not with the idea of keeping the property in the immediate family, but to insure those dependent, or who might become dependent, upon such son, an estate undissipated by incompetence, improvidence, or inexperience. And in the meantime the son should have full use of the property as though he were the sole owner.

"It therefore appears, and is so determined, that the defendant is an heir of Joseph Honore Nault, and as such heir is entitled to one-half interest in the property in issue. As such property has been sold under agreement of parties, this determination shall apply to the proceeds of such sale."

Did the future interest of the wife pass by way of estoppel under the warranty deed of May 16, 1906? This doctrine of estoppel has been applied in certain jurisdictions where a married woman joins her husband in the execution of a warranty deed and afterwards acquires a title through a foreclosure sale of a mortgage existing at the time of the conveyance (*George* v. *Brandon*, 214 Pa. 623 [64 N. W. 371]; *Sandwich Manfg. Co.* v. *Zellmer*, 48 Minn. 408 [51 N. W. 379]); but the general rule is that a married woman is not liable on her covenants in a deed or mortgage made jointly by herself and husband, in the absence of a statute imposing such a liability (note to *Wadkins* v. *Watson*, 22 L. R. A. 779). In this State we have no such statute, and the rule has been repeatedly stated that the married woman's act

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of 1855 confers upon the wife power only to contract and bind herself in relation to her property and estate already possessed, or referring to it, or in relation to property to be acquired by the contract, or in consideration of it. *Johnson* v. *Sutherland*, 39 Mich. 579; *Kenton Insurance Co.* v. *McClellan*, 43 Mich. 564 (6 N. W. 88); *Reed* v. *Buys*, 44 Mich. 80 (6 N. W. 111); *Naylor* v. *Minock*, 96 Mich. 182 (55 N. W. 664, 35 Am. St. Rep. 595); *Edison* v. *Babka*, 111 Mich. 235 (69 N. W. 499). See, also, note to *Mosher* v. *Kittle*, 101 Mich. 345 (59 N. W. 497), for compilation of cases on contracts of married women. In *Arthur* v. *Caverly*, 98 Mich. 82 (56 N. W. 1102), it was held that a married woman uniting with her husband in a warranty deed of his property is liable on the covenant when she obtains all the consideration, which, in that case, was a conveyance to her of other property. The record in the instant case does not disclose for what purpose the wife signed the deed, as she had no dower interest; the husband's interest being simply a life estate. The burden was upon the complainant to show for what purpose she joined in the instrument, and to prove it clearly, and to show that she had brought herself within the rule above set forth. *Mutual Benefit Life Ins. Co.* v. *Savings Bank*, 68 Mich. 116 (35 N. W. 853). This complainant has failed to do, and it necessarily follows that the wife's signature to the instrument was a nullity, and did not bind her subsequently acquired estate.

The decree of the court below is affirmed; but, as this is an amicable proceeding, it having been deemed imperative that this court should construe the will and direct the distribution of the estate so as to protect complainant and the interests of his ward, no costs will be allowed to either party.

MCALVAY, C. J., and BROOKE, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

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CITY OF DETROIT v. WEIL.

1. MUNICIPAL CORPORATIONS — CITIES — LOCAL ACTS — EMINENT DOMAIN—REPEALS.

   By the enactment of Act No. 541 of the Local Acts of 1903, providing that the city of Detroit should thereafter take private property for public use under the provisions of that statute and no other, it was intended that the proceedings should be instituted under the local act only, and no repealing statute having been afterwards passed, Act No. 149, Pub. Acts 1911 (4 How. Stat. [2d Ed.] §10155 *et seq.*), which did not expressly repeal the act, was not applicable.

2. SAME—CONSTRUCTION OF STATUTES—LOCAL LAW.

   There is no presumption of an intention on the part of the legislature to repeal a law to which no reference is made in a subsequent law, unless the intent is clear. Where a statute is enacted for a particular purpose, it is not to be held abrogated by subsequent general legislation, if the intent so to do is not so clear or distinct as to be unavoidable.

3. CONSTITUTIONAL LAW—UNIFORM TAXATION—SPECIAL ASSESSMENTS.

   The constitutional rule of uniformity of taxation does not apply to assessments for local improvements, which are governed by special rules, and are made upon the assumption that the property assessed is specially and peculiarly benefited by a public improvement.

4. SAME—TAXATION—SPECIAL ASSESSMENTS.

   It is within the province of the legislature to say that real estate, alone, shall be the subject of a special assessment, for the reason that special benefits accrue almost exclusively to lands, and under Act No. 541, Local Acts 1903, if the municipal council did not provide a smaller district for purposes of taxation, the entire property of the city must bear the burden.

5. SAME—CITIES.

   The determination of the city legislative body that the entire real estate of the city of Detroit has benefited by

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a proposed improvement is final, unless fraud can be established or unless there is such a want or absence of benefit accruing to the assessed property as to indicate that the burden amounts to spoliation, not taxation.

6. SAME—CIRCUIT COURTS—RECORDER'S COURT OF DETROIT.

The recorder's court of the city of Detroit has exclusive jurisdiction of the taking of private property for public purposes by eminent domain proceedings, and a petition filed in the circuit court should be dismissed upon defendant's plea to the jurisdiction.

Certiorari to Wayne; Mandell, J. Submitted April 23, 1914. (Docket No. 116.) Decided June 1, 1914.

Petition by the city of Detroit against Henry M. Weil and others for the taking of private property for public use, etc. From an order sustaining a demurrer to defendant's plea to the jurisdiction, defendant Weil brings error. Reversed.

John Miner, for appellants.

Edmund Atkinson (Richard I. Lawson, of counsel), for appellee.

Act No. 541, Local Acts of 1903, provides in part as follows:

"An act to authorize the city of Detroit to take private property for the use and benefit of the public.

"SECTION 1. The common council of the city of Detroit is hereby authorized to take private property for the use and benefit of the public within the limitation of the State Constitution, and to institute and prosecute proceedings for that purpose, and all such proceedings on the part of the city of Detroit shall be held and prosecuted under the provisions of this act and no other: *Provided*, that this act shall not apply to cases where petitions have already been filed in the recorder's court under the provisions of act number one hundred twenty-four of the Public Acts of eighteen hundred eighty-three, as amended March twenty-ninth, eighteen hundred eighty-seven, July

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third, eighteen hundred eighty-nine, and June first, eighteen hundred ninety-five.

"SEC. 2. Such proceedings may be commenced and prosecuted under this act whenever the common council shall have declared a public improvement to be necessary in the municipality, and shall declare that they deem it necessary to take private property, describing it, for such public improvement, designating it, and that improvement is for the use or benefit of the public. They shall, by resolution, direct the corporation counsel to institute the necessary proceedings in behalf of the municipality in the recorder's court of said city, to carry out the object of the resolution in regard to taking private property for the city. Before the institution of such proceedings, the common council shall, if it be their intention to assess any part of the damages awarded in such proceedings upon a special or local district, declare by resolution such purpose and fix such district, embracing only such real estate as in their opinion will be specially benefited by the improvement and they shall describe such district with reasonable certainty by well known boundaries, so that all persons owning real estate in such district may readily ascertain the facts."

"SEC. 15. When a verdict of the jury shall have been finally confirmed by the court, and the time in which to take an appeal has expired, or if an appeal is taken, on the filing in the court below of a certified copy of the order of the Supreme Court, affirming the judgment of confirmation, it shall be the duty of the clerk of the court to transmit to the common council, a certified copy of the verdict of the jury and of the judgment of confirmance, and of the judgment, if any, of affirmation, and thereupon the proper and necessary proceedings in due course shall be taken for the collection of the sum or sums awarded by the jury. The common council shall by resolution determine whether the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of real estate contained in the assessment district, already fixed and determined as hereinbefore provided, and the whole or any such just proportion so determined shall be assessed upon the owners or occupants of such taxable real estate, in proportion, as nearly as may be, to the advantage

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which such lot, parcel or subdivision is deemed to acquire by the improvement: *Provided*, that in the case of opening and widening alleys, all damages for the taking of property for such opening or widening shall be assessed upon the property directly abutting the alley, or such portion thereof as is ordered to be opened or widened. The assessment shall be made and the amount levied and collected in the same manner and by the same officers and proceedings, as near as may be, as is provided in the charter of the municipality for assessing, levying and collecting the expense of a public improvement when a street is graded. The assessment roll containing said assessments, when ratified and confirmed by the common council, shall be final and conclusive and *prima facie* evidence of the regularity and legality of all proceedings prior thereto, and the assessment therein contained shall be and continue a lien on the premises on which the same is made until payment thereof. Whatever amount or portion of such awarded compensation shall not be raised in the manner herein provided, shall be assessed, levied and collected upon the taxable real estate of the municipality, the same as other general taxes are assessed and collected in such city."

The common council of the city of Detroit, seeking to provide for the public an adequate approach to the new Michigan Central depot in that city, and to pay the cost thereof out of the general treasury instead of by local assessment, caused a petition to be filed pursuant to the provisions of Act No. 149 of the Public Acts of 1911 (4 How. Stat. [2d Ed.] § 10155 *et seq.*), which act is entitled:

"An act to provide for the condemnation by State agencies and public corporations of private property for the use or benefit of the public, and to define the terms 'public corporations,' 'State agencies' and 'private property' as used herein."

This act contains no repealing clause.

The respondent and appellant is the owner of certain real estate which it was sought to condemn for

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said public improvement, and brings the cause to this court by certiorari to review an order sustaining a demurrer to and overruling his plea to the jurisdiction of said court. It is appellant's contention that said Local Act No. 541 of 1903 in express terms requires all proceedings on the part of the city of Detroit to take private property for public use to be held and prosecuted under the provisions of that act, and no other, and was not repealed by Act No. 149, Pub. Acts 1911, and that the proceedings should have been instituted in the recorder's court of the city, as provided for in the act. Counsel for the city say that, by the terms of Local Act No. 541 of 1903, the common council of the city having adopted no resolution of an "intention to assess any part of the damages awarded in such proceedings upon a special or local district," as provided for in section 2, by virtue of section 15, which provides, "Whatever amount or portion of such awarded compensation shall not be raised in the manner herein provided, shall be assessed, levied and collected upon the taxable real estate of the municipality, the same as other general taxes are assessed and collected in such city," the burden of the improvement could not be placed on all the taxable property of the city, and must be limited to the real estate; that said provision in the local act is bad, for the reason that it is in violation of the constitutional provisions that there must be a uniform rule of taxation. Section 3, art. 10, Const.; section 11, art. 14, Const. 1850. With this view the learned judge agreed in overruling appellant's plea to the jurisdiction.

KUHN, J. *(after stating the facts).* It is clear from the reading of the local act of 1903 that it was the intention of the legislature that all proceedings to take private property for the use and benefit of the public in the city of Detroit should "be held and prosecuted under the provisions of this act and no

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other." Act No. 149, Pub. Acts 1911, containing no repealing clause, it must also be clear that it did not repeal the local act in question. The general legal principles applicable were recently stated by this court in *Hopkins* v. *Sanders*, 172 Mich. 227, 235, 236 (137 N. W. 709), when it was said, in referring to other decisions upon this question:

"From them can be deduced the general principles that repeals by implication are not favored; that there is no presumption of an intention on the part of the legislature to repeal a law where no reference is made to it in a later act, unless the intent is clear, and, where an act is passed for a particular purpose it is not to be held as abrogated by subsequent general legislation, which may be sufficiently broad to include it, unless the intent to abrogate is so clear and distinct as to be unavoidable. * * *

"An examination of the authorities on repeals by implication shows clearly a tendency to sustain local acts as silently excluded from the operation of subsequent general acts, where the legislative intent is not so clear and positive as to render it impossible to do so; and only where the implication of intention to repeal necessarily flows from the language used, and discloses a repugnancy between its provisions and those of the former law so positive that it is impossible to reconcile the two by any fair construction, will repeal by implication be declared."

See, also, *Lake* v. *Village of Cedar Springs*, 162 Mich. 569 (127 N. W. 690).

In considering the question of the unconstitutionality of the local act for the reasons urged by counsel for the city, the distinction between assessments for local benefits and a general tax must be borne in mind.

It is well settled in this State that the rule of uniformity of taxation provided for in the Constitution of the State has no application to assessments for local improvements. *Woodbridge* v. *City of Detroit*, 8 Mich. 274; *Motz* v. *City of Detroit*, 18 Mich. 495;

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Hoyt v. *City of East Saginaw*, 19 Mich. 39 (2 Am. Rep. 76); *Sheley* v. *City of Detroit*, 45 Mich. 431 (8 N. W. 52).

The distinction between these assessments and a general tax is clearly set forth in 2 Cooley on Taxation (3d Ed.), pp. 1153-1155:

"Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for State and municipal purposes, and governed by principles that do not apply universally. The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing to the persons taxed, beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially and peculiarly benefited, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby; their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay. This is the idea that underlies all these levies. The distinction between them and ordinary taxation has thus been pointed out in a recent case:

"'A local assessment can only be levied on land; it cannot, as a tax can, be made a personal liability of the taxpayer; it is an assessment on the thing supposed to be benefited. A tax is levied on the whole State or a known political subdivision, as a county or a town. A local assessment is levied on property situated in a district created for the express purpose of the levy, and possessing no other function, or even existence, than to be the thing on which the levy is made. A tax is a continuing burden and must be collected at stated short intervals for all time, and without it government cannot exist; a local

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assessment is exceptional both as to time and locality—it is brought into being for a particular occasion, and to accomplish a particular purpose, and dies with the passing of the occasion and the accomplishment of the purpose. A tax is levied, collected, and administered by a public agency, elected by and responsible to the community upon which it is imposed; a local assessment is made by an authority *ab extra*. Yet it is like a tax in that it is imposed under an authority derived from the legislature, and is an enforced contribution to the public welfare, and its payment may be enforced by the summary method allowed for the collection of taxes. It is like a tax in that it must be levied for a public purpose, and must be apportioned by some reasonable rule among those on whose property it is levied. It is unlike a tax in that the proceeds of the assessment must be expended in an improvement from which a benefit clearly exceptive and plainly perceived must inure to the property upon which it is imposed.'

"Not all these differences are necessarily existent in every case, but in the main the characterization is accurate as it is forcible."

For a review of other text-books and decisions of other courts on this subject, see *Arnold* v. *Mayor of Knoxville*, 115 Tenn. 195 (90 S. W. 469, 3 L. R. A. [N. S.] 837, and note, 5 Am. & Eng. Ann. Cas. 881); also *County of Adams* v. *City of Quincy*, 130 Ill. 566 (22 N. E. 624, 6 L. R. A. 155, and note).

By the terms of the local act it was designed to assess the cost of such a public improvement upon the real estate of a district which might or might not, in the legislative discretion, be coextensive with the geographical limits of the municipality or political subdivision where the improvement was made. The common council having failed to provide a smaller assessment district, and having determined that the cost should be borne by the city, it becomes a burden on all the taxable real estate of the city. Special assessments, as a rule, are not levied on personal property, but generally on real estate alone. The rule deducible from reading the authorities is that it is within the province of the legislature to say that the

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real estate alone shall be subject to such a special assessment, for the reason that special benefits accrue almost exclusively to lands, so that generally, in works commonly classed as "internal improvements," the real estate alone has been taxed; and that the legislative authority, either of the State, or when properly authorized, of the municipality, may determine over what territory the benefits are so diffused as to render it proper to make all lands contribute to the cost. The legislature having conferred the power on the city by the local act in question to determine how much of the real estate in the city is benefited by the proposed improvement, their determination of the area benefited is final and conclusive, in the absence of fraud, or unless the absence of benefit makes it manifest that the burden amounts to spoliation, and not taxation. *Shimmons* v. *City of Saginaw*, 104 Mich. 511 (62 N. W. 725); 1 Page & Jones' Taxation by Assessment, § 555.

We are satisfied that the said Local Act No. 541 of 1903, because it provides a method of paying for public improvements by a special assessment which may or may not be upon all of the real estate of the city, as the council by proper resolution may determine, is not subject to the constitutional objection urged. The said act providing that all proceedings to take private property for the use and benefit of the public shall be brought under its provisions, and the pending proceedings being clearly of that character, it was improper not to bring them as the act clearly directs.

Appellant's plea to the jurisdiction of the circuit court should have been sustained.

The case is remanded to the circuit court, with directions to make such an order.

MCALVAY, C. J., and BROOKE, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

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WESTCHESTER APPLIANCE CO. *v.* ENGLEHARDT.

CORPORATIONS—ANNUAL REPORT—DIRECTORS.

Directors of a corporation which filed no report in the year subsequent to its organization were not liable for debts contracted during the first year of its existence, the corporation not being in default and the liability of directors under Act No. 137, Pub. Acts 1907 (4 How. Stat. [2d Ed.] § 9543), being dependent upon a default in the filing of the annual report.

Error to Bay; Collins, J. Submitted April 9, 1914. (Docket No. 11.) Decided June 1, 1914. Rehearing denied July 25, 1914.

Assumpsit by the Westchester Appliance Company against John Englehardt to enforce the liability of directors of a corporation as provided by Act No. 137, Pub. Acts 1907 (4 How. Stat. [2d Ed.] § 9543). Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Stoddard & McMillan, for appellant.

E. E. Anneke, for appellee.

OSTRANDER, J. It is the statute duty of every corporation doing business in this State to make and in January or February of each year to file a report showing the condition of the corporation on the preceding 31st day of December. For neglect or refusal to perform this duty, and after a default therein of 10 days, corporate powers are suspended, it can maintain no action in court upon any contract entered into during the period of default, and any director who has neglected or refused to join in making such report is made liable—

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"For all the debts of such corporation contracted since the filing of the last report of such corporation, and shall also be liable to such corporation for any damages sustained by it by reason of such refusal or neglect." Act No. 137, Pub. Acts 1907.[1]

Defendant was director of a corporation organized in February, 1910, which bought goods of plaintiff during the period from February to September, 1910. For the value of the goods judgment was rendered in favor of plaintiff and against the said buying corporation January 9, 1913, and is unpaid. This action is begun to recover the debt, defendant's liability being predicated upon the statute above referred to; it appearing that the debtor corporation, which continued to do business until the summer of 1911, and which was formally dissolved in 1912, made no reports. The court directed a verdict for defendant, upon which there was judgment.

I am of opinion that the judgment should be affirmed. It is plain, I think, that the liability of directors is by the statute made to depend upon a default in filing the report. *Weber* v. *Draper*, 170 Mich. 550, 556 (136 N. W. 596). The debt in question was not contracted during a period of default.

The judgment is affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, BIRD, MOORE, and STEERE, JJ., concurred.

[1] 4 How. Stat. (2d Ed.) § 9543.

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MEYER *v.* GRAND RAPIDS CHAIR CO.

MASTER AND SERVANT—NEGLIGENCE—EVIDENCE.

Where defendant was accustomed to oil various passageways from one portion of its factory to another, so as to slide articles of furniture readily, and it had been customary to oil the surfaces on Saturday night only, and plaintiff, its night watchman, slipped and fell on a quantity of oil that, in some unexplained manner, had been deposited or spilled on the slide or passageway during the week, not on Saturday pursuant to the alleged custom, there was no evidence of negligence or of notice to defendant sufficient to charge it with liability, no testimony being introduced to show how long the oil had been allowed to remain upon the slide.

Error to Kent; McDonald, J. Submitted April 24, 1914. (Docket No. 8.) Decided June 1, 1914.

Case by Joseph Meyer against the Grand Rapids Chair Company for personal injuries. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

George Hollway, for appellant.

Travis, Merrick & Warner, for appellee.

KUHN, J. The plaintiff was the night watchman and night fireman in the furniture factory of the defendant in the city of Grand Rapids. On the fourth floor of this factory, there were three rooms, known as the "varnishing room," the "filling room," and the "staining room." The floor of the varnishing room was about 18 inches above that of the filling room, and a slideway of hard maple, four or five feet wide and seven feet long, ran from the level of the varnishing room to the filling room, and was used in sliding furniture from one room to the other, and

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the employees passed over it in going between the rooms. There were six similar slideways in the factory, and the floors of the three rooms and the slideways between them were kept oiled in order to facilitate sliding the furniture in the process of manufacture and to keep the dust down while the furniture was being finished. There was a fire wall between the varnishing and filling rooms, and at the doorway, which was at the higher end of the slideway, there was a metal fire door, which, sliding on an inclined track, closed of its own weight. The plaintiff, in the performance of his duties, came down this slide six times every night, and, on Wednesday evening, July 27, 1910, while making his second round at 7:10 p. m., after opening the door from the varnishing room, he took one step on the slide, when his feet slipped from under him and he fell, sustaining injuries, to recover damages for which he brought this action.

The negligence relied upon is that the defendant placed a quantity of grease and oil in and upon this passageway without giving the plaintiff any warning that it had been done, it being claimed that it was the custom of the defendant, in the ordinary management of its business, to oil or grease this slideway every Saturday night, of which custom plaintiff was aware, but that it had never been oiled before this occasion on any night except Saturday night.

At the close of plaintiff's proofs, the defendant moved to direct a verdict of no cause of action, upon three grounds: *First*, that no negligence on the part of the defendant had been shown; *second*, that the undisputed evidence showed the plaintiff to have been guilty of contributory negligence; and, *third*, that the undisputed evidence showed the plaintiff had assumed the risk. The learned trial judge granted the motion because of the last two reasons assigned in the motion. We are of the opinion that he might very prop-

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erly have directed the verdict for the first reason assigned, viz., that no negligence on the part of the defendant was proven. The plaintiff's own version as to how the oil came to be there was as follows:

"On the night of the fall the other slides were not oiled, and on this one, the oil was thrown on or spilled on and run down in streaks; it was just as though you took a wet swab and threw it on and let it run down, then there was a streak. It wasn't put on the way it was put on on Saturday. I don't know who put it on. It looked to me as though it had been put on with a swabber, and it looked about the same as it was on Saturday night, except some places through the center there was dry places."

There was no evidence that the defendant knew anything about the oil being there, nor that it had been there for a sufficient length of time to charge the defendant with notice. There is no evidence to show how or by whom the slide was oiled, and no evidence that the defendant placed or caused the oil to be placed on the slide. How it came there is a matter of conjecture. According to plaintiff's testimony, it was not spread over as usual. It was put on at an unusual time and in an unusual manner, and if there is any inference to be drawn from this testimony, it would be that the oil was placed there accidentally. There is no proof in this record from which negligence on the part of the defendant can reasonably be inferred, and hence plaintiff's case must fail. *Toomey* v. *Steel Works*, 89 Mich. 249 (50 N. W. 850), and cases cited. Because of this conclusion, it is unnecessary to pass on the other questions raised by the motion to direct a verdict.

The judgment is affirmed.

MCALVAY, C. J., and BROOKE, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

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CRAWL v. DANCER.

1. DAMAGES—EVIDENCE—TRIAL—COMPROMISE VERDICT.
   Although plaintiff's evidence showed damages amounting to $95.70, and defendant's proofs tended to prove that no cause of action existed, a verdict for $48.50 was rightly allowed to stand, and the court correctly refused to set it aside as a compromise verdict if it did not clearly appear that the jury reached the result by splitting differences.

2. TRIAL—CONDUCT OF COUNSEL—CURING ERROR.
   Any possible prejudice which the defendant may have sustained by plaintiff's attorney's referring to the fact that the plaintiff recovered a judgment in justice's court, was cured on the trial of an appeal by the charge of the court that the jury must disregard the result in the lower court and decide the case upon the evidence presented.

Error to Eaton; Smith, J. Submitted April 21, 1914. (Docket No. 91.) Decided June 1, 1914.

Assumpsit in justice's court by Samuel Crawl against Jess D. Dancer for goods sold and delivered. From a judgment for plaintiff, defendant appealed to circuit court. Judgment for plaintiff. Defendant brings error. Affirmed.

Arthur E. Kidder (Elmer N. Peters, of counsel), for appellant.

L. H. McCall, for appellee.

KUHN, J. Plaintiff recovered a judgment against the defendant in the justice's court of $47.80. On an appeal to the circuit court, in a trial before a jury, it resulted in a verdict and judgment for the plaintiff in the sum of $48.50.

The case is here by writ of error, and it is claimed

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that the trial court should have granted the motion for a new trial which was made by the defendant, because the verdict was a compromise verdict, as it should have been either for the entire amount of $95.70, the claim of the plaintiff, or, for the defendant, no cause of action. The dispute arises out of the method used in scaling certain logs sold by plaintiff to defendant. Plaintiff claims that the logs were sold with butts on, and the defendant claims that the logs were to be butted to get above certain irons and nails which had been driven into the trees. In order to have a verdict set aside because of its being a compromise, it must be clear that the jury reached the verdict by "splitting differences." *Benedict* v. *Provision Co.*, 115 Mich. 527, 531 (73 N. W. 802). We are not satisfied from this record that such an inference is the necessary one, and agree with the trial judge, who, in denying the motion for a new trial, said that the verdict might be supported by the evidence given on the trial.

Defendant also claims that it was error for plaintiff's attorney, in opening the case to the jury, to refer to the fact that the plaintiff had recovered a judgment in the justice's court, and the defendant had appealed. The court, in referring to this in his charge, specifically instructed the jury that they must not be governed by what happened in the justice's court and must decide the case upon the proof offered on the trial before them.

We are of the opinion that no prejudicial error was committed in the trial of the case, and the judgment is affirmed.

MCALVAY, C. J., and BROOKE, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

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REINFORCED CONCRETE PIPE CO. *v.* BOYES.

1. PRINCIPAL AND AGENT—SCOPE OF AUTHORITY—POWERS.
   It is a well settled rule in this State that the apparent scope of the authority of an agent is to be determined by the acts of the principal and not by the acts of the agent; persons dealing with the agent are bound to inquire into the extent of the agent's authority, not from the agent, but, in the absence of written evidence, from the principal.

2. SAME—"HOLDING OUT" PERSON AS AGENT—ESTOPPEL.
   The act of the principal in introducing the agent as the representative who would look after their part of the work, which included, under the written contract between the parties, only the manufacture of concrete pipe, at the place of construction, did not amount to holding out the representative as a general agent, so as to bind the principal for changes made in the work outside the terms of the contract and extras claimed to have been authorized by the representative.

3. CONTRACTS — INTERPRETATION — REASONABLE TIME — DIRECTED VERDICT.
   Under a contract for the manufacture of concrete pipe, of certain dimensions, not fixing a time of delivery or for completion of the work, the question of the time of performance depended on what was reasonable, and, the facts not being in dispute, the question became a question of law for the court.

4. SAME—REASONABLE TIME—QUESTIONS OF FACT AND LAW.
   Evidence that the pipe specified by the written contract was ready for delivery in about two months, that over 3,000 feet was manufactured, and that the work progressed continuously from the time when it was commenced, that substantially the only delay arose from the fact that some curved pipe was required, and that the contract between plaintiff and defendant did not specify curved pipe, *held*, to have warranted the court in directing a verdict for the plaintiff, in an action on the contract, and against the claim of the defendant contractor for recoupment for delay.

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Error to Kent; Brown, J. Submitted April 27, 1914. (Docket No. 144.) Decided June 1, 1914.

Assumpsit by the Reinforced Concrete Pipe Company against David W. Boyes and another for an amount due under a special contract. Judgment for plaintiff on a directed verdict. Defendants bring error. Affirmed.

Charles A. Watt, for appellants.

Martin H. Carmody, for appellee.

KUHN, J. The plaintiff, a corporation with its business offices located at Jackson, Mich., is engaged in the manufacture, under a patented process, of sewer pipe known as reinforced concrete pipe. The defendant Boyes, who resides in Grand Rapids, Mich., is engaged principally as a contractor in street and sewer work in that city. In the summer of 1909 he was successful in obtaining the contracts for the construction of sewers on two of its streets. After bidding on these jobs, and before receiving the contracts, knowing of the business of the plaintiff, he called at its offices in Jackson to get prices on the amount of pipe needed. After some negotiation, and after the contracts were awarded defendant Boyes, the following contract was entered into between the parties:

"This article of agreement, made and entered into this 4th day of September, A. D. 1909, by and between the Reinforced Concrete Pipe Company, of Jackson, Michigan, party of the second part, witnesseth: That the said party of the first part, for the consideration hereinafter named, does hereby promise, covenant, and agree to manufacture for the said party of the second part, approximately:

"18x20 to be manufactured or not as directed by D. W. Boyes.

"732 lin. ft. 18 in. inside diam. reinforced concrete pipe, at 65c. per lin. ft.

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"296 lin. ft. 21 in. inside diam. reinforced concrete pipe, at 75c. per lin. ft.

"852 lin. ft. 24 in. inside diam. reinforced concrete pipe, at 95c. per lin. ft.

"564 lin. ft. 27 in. inside diam. reinforced concrete pipe, at $1.10 per lin. ft.

"266 lin. ft. 30 in. inside diam. reinforced concrete pipe, at $1.35 per lin. ft.

"332 lin. ft. 33 in. inside diam. reinforced concrete pipe, at $1.50 per lin. ft.

"The said pipe is to be manufactured for said second party at the city of Grand Rapids, Michigan, along the line of sewer construction of said city, where free water may be obtained, at such places as are convenient and practicable for the manufacture thereof, and where permission may be had from the city of Grand Rapids for the manufacture of said pipe; said places of manufacture being the place of acceptance and delivery.

"Said party of the first part further agrees to manufacture the pipe in a good workmanlike manner, using a mixture of one part Portland cement and five parts sandy gravel, and reinforce the same, using the American Steel & Wire Company's wire reinforcement in the body of the pipe, with the interlocking joint, as per the specifications of the reinforced concrete pipe, copy of which is hereto attached.

"It is understood and agreed that in the manufacture of said pipe the said party of the first part shall provide such openings for house and catch basin connections as are shown by the plans of the city engineer, or the engineer in charge of said sewer construction, without extra charge, the number and sizes of such openings to be furnished by the party of the second part at the commencement of the manufacture of said pipe.

"It is further agreed and understood that the manufacture of the pipe shall be under the inspection of the city engineer or the engineer in charge of the work.

"The said party of the first part further agrees to furnish a suitable derrick and saddle for the handling and lowering of said pipe into the trench, without extra charge to the party of the second part, excepting, however, the freight to and from Jackson to

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Grand Rapids, Michigan, shall be paid by the party of the second part.

"The said D. W. Boyes, party of the second part, does hereby promise and agree to and with the said party of the first part that he will accept of and receive the said pipe, when so manufactured, at the said places above mentioned, and pay to the party of the first part the prices per lineal foot as stipulated above.

"The said party of the second part further agrees to settle and pay to the said party of the first part, on the 10th day of each and every month during the time the said pipe is being so manufactured, for all pipe manufactured by said party of the first part during the previous month, that is to say, on the 10th day of each and every month after the commencement of the manufacture of the pipe, the said party of the second part shall pay to the said party of the first part for all pipe manufactured by the said party of the first part during the preceding month, and at the completion of the manufacture of said pipe the party of the second part agrees to settle in full and pay the balance due for all pipe manufactured by said party of the first part for this contract. Pipe to be paid for as estimated by the city engineer.

"In witness whereof, the said parties have set their hands and seals the day and date first above written.

"This contract is executed in duplicate.

"THE REINFORCED CONCRETE PIPE COMPANY,
"By E. F. LOWERY, Prest."

"D. W. BOYES."

Attached to the contract was a copy of the standard specifications for the manufacture and composition of reinforced concrete pipe. Shortly after the execution of the contract plaintiff sent on to Grand Rapids the necessary moulds, tools, and machinery for manufacturing the pipe, which was begun on September 23d, under direction of a Mr. Curran, who was the foreman in charge of the gang of workmen on the job. After the work was completed, and when plaintiff insisted on payment according to the terms of the contract, the defendants claimed certain set-offs, amount-

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ing to about $200, composed of various items—for constructing some brick sewer, for bailing, for extra cement around pipes under railroad tracks, and for city inspection charges—all of which were outside the terms of the contract. This claim resulted in the present controversy. On the trial of the case the defendants admitted the full amount claimed by the plaintiff in its bill of particulars, and claimed the benefit of Circuit Court Rule 24*c*, in respect to the opening and closing in the taking of the testimony and the argument on the trial of the cause. This right of a set-off was based by the defendants on two propositions, viz.:

(1) That Mr. Curran was held out to defendant Boyes as an agent having authority to charge the plaintiff for the minor changes which were made.

(2) That the pipe to be manufactured and supplied by the plaintiff under the contract was not furnished to the defendant Boyes within a reasonable time, as a result of which he suffered losses.

At the close of defendants' proofs, the trial judge directed a verdict for the plaintiff, and whether or not the two propositions above set forth, under the proofs in this case, raised questions of fact which should have been submitted to the jury is the question to be considered in reviewing the case here.

Instead of manufacturing its pipe at Jackson and shipping the same to its customers as ordered, the plaintiff company, after making its contract for a specific amount of pipe, sends its employees to the place where the pipe is used and manufactures it there. An examination of the contract shows that by its terms the only duty devolving upon the plaintiff was to manufacture the pipe of the sizes and dimensions called for in the contract in the manner and the place provided for in the contract. As to Curran's connection with the work, the defendant Boyes testified:

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"Mr. Curran was the representative of the Jackson people, the Reinforced Concrete Company. He was introduced to me here in this city as a representative that would look after their part of the work here. He was superintendent or foreman of construction of the work here. He went to the gravel pit at different times, in with the inspector, and loaded the gravel. All I can say is that he ordered the gravel and went out different times to the gravel pit with the inspector. Other materials were purchased there—cement and slants for the pipe. He ordered them as he wanted them, always. He hired the men. Mr. Curran had supervision of the work as it went along. If any changes were made in the manner of doing work as it went along, Mr. Curran made them. * * * Mr. Curran ordered that change in the form or in the pipes. He superintended the work of the men there. Mr. Curran had general charge of all work that was done in the city of Grand Rapids on those two jobs, so far as I know. I dealt with Mr. Curran, that is, in regard to the work."

It is a well-settled rule in this State that the apparent scope of the authority of the agent is to be determined by the acts of the principal, and not by the acts of the agent. *Marx* v. *King*, 162 Mich. 258, 267 (127 N. W. 341), and cases cited; 31 Cyc. p. 1322. In *Delta Lumber Co.* v. *Williams*, 73 Mich. 86, 91 (40 N. W. 940), this court said:

"Corporations are bound by the acts of their agents to the same extent, and under the same circumstances, as natural persons. Agents may have as much or as little power as their principals see fit to give them, and one dealing with an agent is bound to inquire into the extent of his authority, not from the agent, in the absence of a written evidence of authority, but from the principal, if accessible; and dealings or engagements of the agent beyond the scope of his authority do not bind the principal. *Bond* v. *Railroad Co.*, 62 Mich. 643 [29 N. W. 482, 4 Am. St. Rep. 885]."

It is urged that the statement in defendant Boyes' testimony, "He was introduced to me here in this city as a representative that would look after their part

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of the work," was a holding out of Curran as a general agent. By the terms of the contract, plaintiff's part of the work was to manufacture the tile, and the statement could mean nothing more to defendant Boyes, who was the other party to the contract, than that Curran was in Grand Rapids for that purpose, to look after plaintiff's part of the work—to manufacture the tile. It further appears that the defendant Boyes at different times telephoned the offices of plaintiff at Jackson with reference to details of the work. In the absence of express authority from the plaintiff holding out Mr. Curran as its general agent, it was incumbent upon the defendant Boyes to make inquiry of the plaintiff, if he desired to bind plaintiff as to matters outside of the contract because of acts of Curran. It is claimed that the instant case should be governed by the decision of this court in *Teakle* v. *Moore,* 131 Mich. 427 (91 N. W. 636). We think it is clearly distinguishable from the present case, as in that case all the contracts for the different portions of the work on a building referred to the supervising architect as the agent of the owner, and it was held that this was a sufficient authorization to bind the owner to an arrangement made by the architect with a contractor for the erection of a scaffold. We agree with the trial judge that there was not sufficient evidence to warrant submitting to the jury the question of charging plaintiff on account of expenditures made by the defendant Boyes because of alleged consent by Curran, who was plaintiff's foreman on the job.

The contract does not specify the time in which the work was to be done. Defendant Boyes' contracts with the city required the completion of the work by December 10, 1909. It appears that the plaintiff had manufactured and placed on the ground ready for use all pipe ordered by the defendant Boyes within the time provided in his contracts with the city for the completion of the work, although these contracts with

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the city were not made a part of the contract between the plaintiff and said defendant. It is claimed that the work was delayed because the plaintiff manufactured a size of pipe at first which the said defendant could not use to advantage. Nothing is contained in the contract as to which size of pipe should be furnished first. It is admitted that ten days after signing the contract the work actually began, and that, with the exception of time consumed putting in a curved brick sewer and one or two days when it was held up by the city inspector because of green pipe, there was no delay. The contract did not provide for curved pipe, and the fault of this delay must be ascribed to the said defendant in failing to provide for it. It is an elementary proposition of law that, where no time is specified in the contract for the completion of work, it must be done within a reasonable time. What is reasonable time usually depends upon the nature of the contract and the particular circumstances. Where facts are in dispute, it presents a question of fact for the jury. *Stange* v. *Wilson*, 17 Mich. 342; *Coon* v. *Spaulding*, 47 Mich. 162 (10 N. W. 183); *Hill* v. *Mathews*, 78 Mich. 377 (44 N. W. 286); *Greenwood* v. *Davis*, 106 Mich. 230 (64 N. W. 26).

When the question of reasonable time depends, however, upon the construction of a contract in writing or upon undisputed facts outside of the contract, it becomes a matter of law. 9 Cyc. p. 614. In the instant case the contract is in writing, and the only testimony offered was that of the defendant Boyes. There is no evidence showing the usage or amount of time reasonably required to manufacture the number of feet of pipe of the sizes and kind mentioned in the contract. The amount of pipe, 3,042 feet, was completed and ready for the defendant Boyes in a little over two months. We are of the opinion that there was no question of fact to submit to the jury, and that the court properly determined the question of reason-

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able time under the circumstances of this case to be a question of law, and rightfully determined it in favor of the plaintiff.

Judgment affirmed.

MCALVAY, C. J., and BROOKE, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

LERCHE *v.* KISHPAUGH.

1. GIFTS—EVIDENCE—TRUSTS—DELIVERY.
   Testimony of a third person that decedent entered the house of his sister, who was then dying, and took a package containing money, saying, in her presence, that they were valuables, and that, at the time, the witness supposed the brother was speaking to him, was insufficient to show a delivery or establish a gift in trust for the benefit of certain persons mentioned in oral instructions of the sister, as alleged by the donee.

2. SAME—TRUSTS—ADMISSIONS.
   Evidence of declarations and admissions of a donor are insufficient to establish a gift, and are only competent to corroborate other evidence.

3. SAME—EQUITY—EVIDENCE.
   A letter written by decedent, admitting that his sister, deceased, had given him a certain sum in trust for his brother's wife, to whom he was instructed to pay interest until the lapse of 24 years, and thereafter to divide it between the minor children of his brother, while possibly binding on the writer, was not such a declaration of trust as to bind the estate of the deceased sister.

4. SAME.
   And the fact that the deceased deposited the money in banks in his name and that of his deceased sister, jointly,

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tended to disprove his contention that there was an absolute transfer in trust, and was in recognition of the rights of the decedent.

Appeal from Tuscola; Beach, J. Submitted April 30, 1914. (Docket No. 156.) Decided June 1, 1914.

Bill by Pearl E. Lerche and others, by next friend, against Fred Kishpaugh, administrator of the estate of Charlotte M. L. Still, deceased, and another, for the enforcement of an alleged trust. From a decree for complainants, defendant Kishpaugh appeals. Reversed.

Black & Roberts, for complainants.

Terry & Parsons, for defendant Kishpaugh.

KUHN, J. The bill of complaint in this cause was filed to establish and enforce a trust in favor of the minor children of the complainant and of Lillie Lerche, his wife. Charlotte M. L. Still, who lived in the village of Gaines, Genesee county, Mich., died intestate on September 11, 1912, and left surviving her a daughter, Rose Kishpaugh, and two brothers, Gustave and Henry Lerche. Gustave Lerche died on November 3, 1912. The claims of the parties are concisely stated by counsel for appellant, as follows:

"It is the claim of complainant in the original bill that said sum of $3,000 was delivered by Charlotte M. L. Still, who is conceded to have been the owner of said money, during her lifetime, to her brother Gustave E. Lerche, with oral instructions to hold said sum and pay the interest therefrom to Lillie Lerche, wife of complainant, for a period of 24 years, at the end of which period, he was to divide said money equally between the children of said complainant. It is the contention of defendant Kishpaugh, administrator of the estate of said Charlotte M. L. Still, that said money was never delivered by said Charlotte M. L. Still to said Gustave E. Lerche; that there is no evidence in the record showing any knowledge on her part that

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said money was being taken, or was to be, or had been taken by said Lerche, and that there is no evidence showing that she ever instructed or directed said Lerche to take said money for the purposes of the alleged trust or any other purpose; and finally, that the alleged trust, resting entirely in parol, is void under the statute of frauds."

The administrator of the estate of Gustave E. Lerche in his answer makes no claim to said money as a part of the assets of the estate, and was subsequently ordered by the decree of the court to pay the money to the register of the court.

The only question, therefore, in the case is whether the money in question belongs to the complainant as next friend of his minor children and to Lillie Lerche, or to the estate of Charlotte M. L. Still. The learned chancellor who heard the case sustained the contention of the complainant, and from a decree in his favor the defendant Kishpaugh, administrator of the estate of Charlotte M. L. Still, has appealed.

The only person who testified as to the taking of the money by Gustave E. Lerche was George W. Chase, whose testimony is as follows:

"*Q.* During the time you were there, did she say anything to you in regard to not wanting her daughter, Mrs. Kishpaugh, to have her property?

"*Mr. Terry:* I object to that as incompetent and immaterial.

"*The Court:* Taken subject to the objection.

"*A.* Yes, I have heard her say that she didn't want the daughter to have the property. She said if the papers were drawn she wouldn't allow her one dollar.

"*Q.* Did she want you at any time to get anybody to draw papers, make her will?

"*A.* She requested me one morning to get a person —to get McCann, she said.

"*Q.* You didn't get him at that time?

"*A.* No.

"*Q.* How long was that before her death?

"*A.* About a week; I suppose, a little better than a week.

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"*Q.* Had she her mental faculties all right up to the time of her death?

"*A.* I believe so.

"*Q.* Do you remember her brother Henry Lerche being there?

"*A.* Yes.

"*Mr. Terry:* All this testimony is taken subject to our objection.

"*The Court:* Yes.

"*A.* I remember her brother Gustave Lerche coming there twice before her death. The last time he was there was on Sunday. He came on Sunday morning before she died. I can't say what morning she died on.

"*Q.* Did Mrs. Still say anything to you about wanting him to stay all night?

"*A.* She did.

"*Q.* What did she say? What reason did she give you for not wanting him to go?

"*A.* She said she didn't want to think of his being on the road; afraid he was going to—

"*Q.* Did she tell you what he was going to do?

"*A.* She did not.

"*Q.* In the morning did you have any conversation with Gustave E. Lerche?

"*A.* Yes; I did. He wanted me to come in the house. He was going to take something.

"*Q.* Where did you go then?

"*A.* We went into her bedroom.

"*Q.* What was done after you got into her bedroom?

"*A.* He went in the closet and got a small hand bag or satchel and says: 'This is the valuables. I won't say what they are, but they are valuables.'

"*Q.* How far away was she at that time?

"*A.* About four feet, I should judge.

"*Q.* What did he do then?

"*A.* He stooped down and kissed her good-bye. He left the house at that time. She died the next morning."

Cross-examination by Mr. Terry:

"*Q.* To whom were these remarks addressed: 'These are valuables. I won't say what they are?'

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"*A.* I don't know whether they were addressed to me or to her, but he was looking at me.

"*Q.* You supposed he was speaking to you?

"*A.* Yes; after Mrs. Still was buried he told Mr. and Mrs. Kishpaugh and myself that he had taken and carried away $3,000. I think he said he put it in the banks at Bay City.

"*Q.* What did you observe him carrying away from there that morning when he said, 'This contains valuables?' What did he have; what were they in? Done up in a paper or what?

"*A.* I can't say; they were in this little red satchel or hand bag, whatever you call it.

"*Q.* What he had was a little red satchel in his hand?

"*A.* Yes.

"*Q.* Did he have anything else in his hand, in any way, except the little red satchel?

"*A.* No; I don't think so.

"*Q.* What he referred to in speaking of valuables, was that this little satchel contained valuables?

"*A.* Yes, sir.

"*Q.* You didn't know what was in that satchel?

"*A.* No.

"*Q.* You didn't know whether these valuables were his or hers or whose valuables they were?

"*A.* I couldn't say."

On the 10th day of September, 1912, the day the money was taken, Gustave E. Lerche deposited $1,000 in the First National Bank of Bay City, taking a certificate of deposit payable to G. E. Lerche or Mrs. George Still, who, it is conceded, is the same person as Charlotte M. L. Still. He also, on the same day, deposited $1,000 in the Bay City Bank of Bay City, in the savings department. The books of the bank show the following entry relative to the transaction:

"Account opened by G. E. Lerche and/or Charlotte Still. She is ill and cannot write, but has an equal interest in money. She is sixty-seven years old. Charlotte Still also to draw. Address, Akron, Mich. R. F. D. number 3."

On the same day Gustave E. Lerche, who was also

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known as G. A. Lark, deposited $1,000 in his own name in the savings department of the Old Second National Bank of Bay City.

Complainant seeks to establish the gift and the trust by the declarations of said Gustave E. Lerche made to Frederick Kishpaugh and others and by a letter written by Gustave E. Lerche to Frederick Kishpaugh, which reads as follows:

"WISNER, September 10, '12.

"I have thought over the matter of this money and have come to the decision that I have no authority to pay any of this money over to anybody, only as Charlotte told me in plain words the money was left with me in trust to put on interest, the interest to go yearly to Lillie, for a period of twenty-four years, after that the money is to be divided between Henry's children. I promised Charlotte on her deathbed to do this much for her and I am going to keep my word to her.

"Yours truly,

"G. A. LARK."

Without these declarations and the testimony of witness Chase, the record is absolutely barren to show any evidence that Charlotte M. L. Still intended to give the money in question as claimed by complainant. At the time the money was taken, 24 hours before her death, it does not appear whether she was awake or asleep, or was conscious of what was taking place. The mere taking of the money as testified to by the witness Chase does not show a delivery of the money, and, in our opinion, is not sufficient to sustain the gift. *Casserly* v. *Casserly*, 123 Mich. 44 (81 N. W. 930). Gifts of this character, under the authorities, must be consummated by a delivery, either actual or constructive, and the intention of the donor to place the property beyond his or her control must be clear. The way in which Gustave E. Lerche deposited the money in the banks is convincing to our minds that he fully recognized at the time the right of Charlotte M. L. Still to the money, and is entirely

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inconsistent with complainant's claim that the money had been absolutely turned over to him in trust.

In the case of *Campbell* v. *Sech*, 155 Mich. 634 (119 N. W. 922), this court said that evidence of declarations and admissions of the donor are not sufficient to establish a gift, and are only admissible as corroborative of other testimony, citing 20 Cyc. p. 1225. The case of *Kremer* v. *Mette*, 148 Mich. 376 (111 N. W. 1086), is relied upon to sustain the proposition that the letter above set forth is sufficient to constitute a declaration of trust. It is true that, under this authority, the letter might be used to bind the estate of Gustave E. Lerche, but, not being the writing of the conceded owner of the property, as was the case in *Kremer* v. *Mette*, *supra*, it is not binding upon the estate of Charlotte M. L. Still.

We are of the opinion that the proofs were insufficient to establish the gift and trust, and that the conclusion of the chancellor was erroneous.

His decree is therefore reversed, and a decree will be entered in this court directing the payment of the money here involved to Frederick Kishpaugh, administrator of the estate of Charlotte M. L. Still, deceased, but, in view of all the circumstances of this case, without costs.

MCALVAY, C. J., and BROOKE, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

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MAKI *v.* ISLE ROYALE COPPER CO.

1. MASTER AND SERVANT—EVIDENCE—PRESUMPTIONS.
Where plaintiff was struck by an empty bucket which fell on him while he was employed in the mine of the defendant, and the testimony tended to show that the bucket had been fastened to a lowering device by a knotted chain, although there was no proof that a bolt or key had not been used in fastening the chain, evidence that the use of such bolt or fastener would prevent the loosening of the knot, had a tendency to support the claim of the plaintiff, and under the established rule that the facts must be considered in the light most favorable to the party against whom it is proposed to direct a verdict, the question should have been left to a jury.

2. SAME—SAFE PLACE—MINES—SAFE APPLIANCES.
The master is required to furnish a reasonably safe place in which the servant may carry on his work, and to maintain the appliances used in carrying it on in reasonably good repair.

3. SAME—FELLOW-SERVANTS.
The duty to ascertain that the chain and hoisting apparatus was safe and properly adjusted was a nondelegable duty of the employer.

Error to Houghton; Cooper, J., presiding. Submitted April 30, 1914. (Docket No. 139.) Decided June 1, 1914.

Case by Jacob Maki against the Isle Royale Copper Company for personal injuries. Judgment for defendant on a directed verdict. Plaintiff brings error. Reversed.

Le Gendre & Driscoll, for appellant.

Rees, Robinson & Petermann, for appellee.

KUHN, J. The plaintiff received injuries as the result of an accident while in the employ of the de-

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fendant, and the question here involved is how the accident occurred and whether it can be said to be attributable to the negligence of the defendant. The learned trial judge, at the close of plaintiff's proofs, directed a verdict for the defendant, on the ground that the proofs were insufficient to show any negligence on the part of the defendant, and also that the negligent act which the plaintiff assumed there was sufficient evidence to support to require its submission to the jury was the act of plaintiff's fellow-servant.

The defendant was operating a copper mine and a stamp mill in Houghton county. Inside of the mill were stamp heads to break the rock, the foundations of which are made of concrete. One of these heads had become defective, and the defendant, in the spring of 1911, was engaged in reconstructing it. A hole about 35 feet deep had been mined, and fresh concrete was being put into the hole. The concrete was mixed on the floor of the mill near the top of the hole and was lowered into the hole by a half-ton coal bucket, about two feet square and high. For this purpose there was used a steam winch, consisting of a niggerhead attached to the shaft of an engine, so that the engine would turn it, a hemp rope, and two double blocks, the upper of which was attached to a carriage near the top of the mill, and the lower of which was suspended beneath the upper; the rope being passed through the blocks in such manner that between them were three thicknesses of rope. There was a hook on the lower block to which the bail of the bucket could be attached. The operations in the mill were in charge of Jim Glanville, who was the superintendent, and Jack Glanville, who was known as the mill boss and also as the master mechanic and, at the time of the accident, was the foreman of the gang on the job. On the day of the accident, he fixed

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up the hoisting apparatus for lowering the concrete into the hole. At first the bail of the bucket was attached directly to the hook of the lower block, but at the time of the accident, instead of the bail being attached directly to the hook, it was attached to it by means of a 10-foot chain, which was done by Jack Glanville, who had general charge of all the machinery about the mill, and whose duty it was to inspect it and keep it in repair. The plaintiff had been hired on the day before the accident as a surface hand to level ground and perform similar common labor. On the day of the accident, he and three others of the surface gang were ordered by the surface boss to go to the mill for work and were there ordered by the mill boss to go down in the hole and empty concrete from the bucket when it was lowered and spread and tamp the concrete in the hole. When they first started to work, small rocks fell down upon them, and one of their number went up and told the superintendent that they did not want to work there. The superintendent told them to go back to work, and that he would see that nothing fell on them. Planks were then placed over the hole, leaving only a space large enough for the bucket to pass through. It was at this time that the chain was used by Glanville. It had a ring at one end and was wound twice around the bail of the bucket, then passed through the ring at the end of the chain, and then passed upward to the hook of the lower block, to which the other end was attached by a double knot in the chain. After the plaintiff had been working in the hole about two hours, without any warning, the chain became unloosed from the hook of the lower block, and the bucket, while empty, fell and struck the plaintiff and caused the injuries complained of.

There was testimony to show that, if a chain were knotted in the way this chain was, it should also be bolted in order to be reasonably safe. The learned

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trial judge held that there was no evidence that there was no bolt in the knot in the chain in question. The testimony with reference thereto was as follows:

Witness Abramson testified:

"I saw the plaintiff get hurt. The bucket hurt him. The bucket fell and struck him. It fell from the top.

"*Q.* Before it fell, was it at the place where it would hang while it was being loaded?

"*A.* Just the same place. It didn't strike anything before it fell. When it fell there was a chain attached to the bail of it. That was the chain by which it had been attached to the hook on the block; I think the length of that chain was about ten feet.

"*Q.* And was there any hook or rings on the end of the chain?

"*A.* No, there was none.

"*Q.* Wasn't there something on one end of the chain?

"*A.* At the end it was attached to the bail of the bucket, I don't remember whether there was a ring or hook.

"*Q.* But there was nothing on the other end, neither ring or hook?

"*A.* The other end there was neither one.

"*Q.* And how had it been attached to the hook of the block?

"*A.* By a knot in the chain. When the bucket fell the chain came with it. * * * When the bucket fell down one end of the chain was attached to the bail of the bucket, and the whole chain came down with the bucket. There was no hook or ring in the loose end of the chain; that is, the end opposite to the one which was attached to the bail of the bucket. There was nothing there.

"*Q.* Where was the block, the lower block, at the time the bucket fell?

"*A.* It was up there at the place where the bucket was filled in, and where it fell from. I saw the lower block right after the bucket fell. There was no hook or ring then attached to the hook of the block; there wasn't any. No hook or ring fell. No loose hook or ring fell at the time the bucket fell into the hole.

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"*Q.* Did you see, before the bucket fell, how the chain was attached to the hook of the block?

"*A.* It was attached by a knot."

On recross-examination he said:

"*Q.* You don't remember how this chain was fastened to the bail of the bucket?

"*A.* I don't remember whether there was a hook or ring, but one of those was there. It must have been a ring there. It could not have been anything else. I said I didn't know whether it was a ring or a hook because I don't remember just which one it was. I am not sure that it was a ring now, but I think so.

"*Q.* How was it fastened with this ring? Just describe how the chain was fastened to the bail of the bucket.

"*A.* The chain would be up through the ring and around the bail. I mean the chain would be up around the bail first, then through the ring. That was still attached that way when the bucket reached the bottom of the hole. I looked at this chain to see how it was fastened to the bucket and to the rope after it fell down and right after Maki was taken up. I looked at the manner in which the chain was fastened to the block at the time it was up there. That was about 9 o'clock in the morning. That was before I went down in the hole. I looked this thing over before I went into the hole.

"*Q.* Now what was there in the block, a hook or a ring, attached to the block?

"*A.* Hook.

"*Q.* Just describe how this chain, now, was fastened to the hook. Just tell in detail just exactly how it was fastened?

"*A.* I don't know; I didn't see just exactly how it was; all I do know it was tied by a knot. The knot was in the chain. Made out of the chain and that fastened to the hook. The chain was run around the hook twice. It was a double knot. There was nothing at the end of the chain excepting the last link. There was no hook or ring. I am absolutely sure of that. Right after the accident I went up to look at the block. I went up for the purpose of looking at the block. I examined the block very carefully.

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* * * The block itself was all right; it was good, except that the knot got open. Wendela and Arvo looked at the chain with me down below. They both examined the chain; I helped to bring Maki up. I did not examine the chain before we brought him up, after he was taken up. After he was taken up then I went down and examined this chain, then I came up and examined the block."

Again, on redirect examination, he testified:

"*Q.* What was it that caused the bucket to fall?
"*A.* The cause was because the knot got open and loose and it came down."

On being recalled, he said:

"*Q.* You have testified that the chain was attached to the hook of the lower block by knotting it.
"*A.* It was knotted.
"*Q.* Was there any bolt through the chain or anything there to prevent the knot from slipping?
"*A.* That I don't remember, if there was any.
"*Q.* Wouldn't you remember it if there was one there?
"*A.* I don't remember at all.
"*Q.* Didn't you look at the chain after the accident?
"*A.* Yes.
"*Q.* You didn't see any bolt on it then, did you?
"*A.* No.
"*Q.* No bolt dropped down in the hole after the bucket fell, did it?
"*A.* No.
"*Q.* And you saw no bolt around there any place? That is, no loose bolt?
"*A.* Nowhere. When the chain was knotted there, I could see the ends of the chain. The end of the chain was quite long, but I don't remember if there was anything else there, but the time we came down there was nothing there then."

Witness Quinlan testified:

"*Q.* In your opinion, where a bucket of the size I have described is being used above a place where men are working, is it safe or proper to use a chain with knots in it?

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"*A.* I don't consider it is. I am a little against using a chain the likes of that kind without it's a mighty good chain. A steel tested chain and knots on a chain is very uncertain without a keeper of some kind, a bolt through the links to keep it from slipping. The shaking and jerking loosens the chain.

"*Q.* If a 10-foot chain were used to connect the bail of the bucket with the lower hook (or the hook of the lower block) and was knotted, say, with a double knot, and a bolt was put through it in the way you have suggested and put in there properly, could the bucket fall away when the bucket was empty, by becoming disconnected from the hook while hanging suspended, could the knot become loosened?

"*A.* Not very well, I should judge. The chain would have to break, I should judge. * * *

"*Q.* And, if it is so fastened, would the bucket fall away merely of its own weight; that is, of its own weight while it is being suspended empty?

"*A.* It couldn't very well fall away unless the puffer let the slack out of it the chain broke.

"*Q.* You have seen where the chain became unloosened from the hook after it had been fastened?

"*A.* I don't think it could. I never seen one come loose with the bolt through."

It is true that there is no positive direct testimony that there was no bolt in the knot at the time of the accident, but, having in mind the well-established rule that, in directing a verdict for the defendant, the facts in the case should be viewed most favorably to the plaintiff, can it be said that a reasonable inference cannot be drawn that the bucket fell because of the failure to furnish the knot with the necessary bolt? In this State, defendant's negligence cannot be presumed and must be proven, but we think the reasoning of this court in *Schoepper* v. *Chemical Co.*, 113 Mich. 582, 586, 589 (71 N. W. 1081, 1082, 1084), is applicable to the instant case. Justice MONTGOMERY, speaking for the court, said:

"Defendant's counsel contend that the cause of this explosion is a matter of mere conjecture, and it is

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said by counsel that it is not enough for plaintiff to prove circumstances consistent with her theory, but that these circumstances, and each of them, must preclude any other rational conclusion. This we take to be but another way of stating the proposition that the proof must exclude all reasonable doubt. It is hardly necessary to say that no such rule obtains in civil cases. It is true that where an injury occurs that cannot be accounted for, and where the occasion of it rests wholly in conjecture, the case may fail for want of proof. *Robinson* v. *Charles Wright & Co.*, 94 Mich. 283 [53 N. W. 938]; *Redmond* v. *Lumber Co.*, 96 Mich. 545 [55 N. W. 1004]. But such cases are rare, and that rule should never be so extended as to result in a failure of justice, or in denying an injured person a right of action where there is room for balancing the probabilities and for drawing reasonable inferences better supported upon one side than the other. In this case there was no direct proof of any other probable producing cause of the explosion than such as was offered by the plaintiff. * * * Negligence, like any other fact, may be inferred from circumstances. *Alpern* v. *Churchill*, 53 Mich. 613 [19 N. W. 549]; *Barnowsky* v. *Helson*, 89 Mich. 523 [50 N. W. 989, 15 L. R. A. 33]. And, though the proof of plaintiff depended upon inference to establish the main fact, the question of whether the inference suggested by the plaintiff's theory is the correct one, or whether it was sufficiently rebutted, was for the jury. *Crosby* v. *Railway Co.*, 58 Mich. 458 [25 N. W. 463]; *Hagan* v. *Railroad Co.*, 86 Mich. 615 [49 N. W. 509]; *Woods* v. *Railway Co.*, 108 Mich. 396 [66 N. W. 328]. The judgment will be reversed, and a new trial ordered."

See, also, *La Fernier* v. *Wrecking Co.*, 129 Mich. 596 (89 N. W. 353); *Mirabile* v. *Murphy Co.*, 169 Mich. 522 (135 N. W. 299); *Maki* v. *Mining Co.*, 176 Mich. 497 (142 N. W. 780).

We have, in the instant case, the testimony above set forth and the physical fact that the bucket fell while it was empty and suspended upon the chain without being subjected to any unusual strain or jar. We are of the opinion that a reasonable inference

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supporting the plaintiff's theory of the case might properly be drawn by a jury, and that this question should have been submitted to the jury.

The rule that it is the duty of the master to provide his servant a place reasonably safe to work in, and that it is his duty to keep the machinery and appliances used in carrying on the work in reasonably good repair, is firmly established in this State.

Likewise that when the master delegates this duty to a servant, no matter what his grade or rank, the servant cannot be held to be a fellow-servant to relieve the master of liability. Jack Glanville's duty to see that the chain was safe and properly adjusted was the duty of the master, and in doing so he acted for the master. In this he was the defendant's agent and vice principal and not the plaintiff's fellow-servant. *McDonald* v. *Railroad Co.*, 132 Mich. 372 (93 N. W. 1041, 102 Am. St. Rep. 426); *Orso* v. *Engineering Works*, 164 Mich. 568, 571 (129 N. W. 673), and cases cited.

It follows that the judgment must be reversed, and a new trial granted.

McALVAY, C. J., and BROOKE, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

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FORSYTHE *v.* WASHTENAW CIRCUIT JUDGE.

1. JUDGMENT—RECORD—ASSUMPSIT—AMENDMENT.
   The incorrect entry of a judgment in tort as a judgment in assumpsit was open to amendment under 3 Comp. Laws, § 10270 (5 How. Stat. [2d Ed.] § 12971).
2. EXECUTION—SHERIFF—INDORSEMENT.
   The court is authorized to permit the sheriff, who has omitted to indorse on a writ of execution the date of its receipt or delivery to him, to make the correction after return *nulla bona*.
3. ARREST—CIVIL PROCESS—CAPIAS AD SATISFACIENDUM.
   Although an action of tort may have been instituted by summons instead of a capias, the plaintiff does not thereby lose his right to the writ of *capias ad satisfaciendum* after judgment.

Mandamus by Allen G. Forsythe against Edward D. Kinne, circuit judge of the county of Washtenaw, to compel respondent to vacate a writ of *capias ad satisfaciendum*. Submitted April 1, 1914. (Calendar No. 26,128.) Writ denied June 1, 1914.

Byron J. Corbin and *Frank E. Jones*, for relator.

Cavanaugh & Burke, for respondent.

BROOKE, J. Relator prays for the issuance of a writ of mandamus against respondent requiring him to recall and quash a writ of *capias ad satisfaciendum*. The antecedent facts are briefly as follows: One Della Anthony brought suit against relator and another in an action of trespass upon the case. The suit was commenced by a summons, and the declaration charged relator with fraud. Under a plea of the general issue, the parties went to trial, and a judgment was rendered against relator on the 27th day of Octo-

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ber, 1913. On the 24th day of November, 1913, an execution was issued upon said judgment, made returnable January 15, 1914. Under date of January 10, 1914, the sheriff returned the execution *nulla bona*. On January 12, 1914, a writ of *capias ad satisfaciendum* was issued, although the record is silent as to the application therefor. The relator was arrested upon said writ and on January 13, 1914, gave a bond in the penal sum of $7,500 to the jail limits of the county of Washtenaw. On January 19th relator made a motion for an order recalling and quashing said writ of *capias ad satisfaciendum*, based upon the following grounds:

"*First.* That the said writ was issued without warrant or authority in law therefor.

"*Second.* That the plaintiff in the above case had waived the tort, if any, set up and complained of in the declaration in said cause, and had taken and accepted a verdict of the jury therein in assumpsit on contract.

"*Third.* That, at the time of the issue of the said writ of *capias ad satisfaciendum*, no judgment had been made and entered in said cause.

"*Fourth.* That no writ of execution had been issued in said cause and returned unsatisfied previous to the issuance of the said writ of *capias ad satisfaciendum*.

"*Fifth.* That there is no order or authority in said cause for the issuance of said writ.

"*Sixth.* That there is no order in connection with said writ to hold to bail the defendants.

"*Seventh.* It does not appear from the said writ that any judgment has been entered in said cause and the amount thereof so that the amount of bail under said writ may be determined."

The action of the trial court in refusing to grant the order is reviewed in this proceeding. Relator discusses several minor questions arising antecedent to the issuance of the *ca. sa.* These relate to the form in which the verdict was originally entered and its amendment under the authority of the court and to

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the failure of the sheriff to note upon the *fi. fa.* the date of its receipt by him. It appears from the return that the verdict was taken in due form by the clerk of the court, but that an inexperienced deputy incorrectly entered it as a verdict in assumpsit instead of one in tort. By direction of the court the entry of the verdict was amended to conform to the fact. The amendment was properly made. *Reynolds* v. *Cavanaugh*, 139 Mich. 387 (102 N. W. 986). See 3 Comp. Laws, § 10270.

On March 2, 1914, Leo J. Kennedy, deputy sheriff, filed an affidavit in the cause stating that he had received the writ of execution on the 24th day of November, 1913, and asking for leave to indorse such receipt upon the writ; the same having been omitted through an oversight. This, in our opinion, was properly permitted by the court. *Shepard* v. *Schrutt*, 163 Mich. 485-490 (128 N. W. 772). The meritorious question raised by this application is the first one, "that the said writ was issued without warrant or authority in the law therefor."

It is the claim of relator that plaintiff, Della Anthony, having commenced her action by summons instead of by a *capias ad respondendum*, as she might have done under section 9996, 3 Comp. Laws, is now precluded from having recourse to a writ of *capias ad satisfaciendum*, although she would have been entitled to the latter writ had she used the more rigorous process as commencement of suit. The precise question seems never to have been raised in this court.

3 Comp. Laws, § 10301, provides:

"Such execution may be either: (1) Against the goods and chattels, lands and tenements of the party against whom such judgment was recovered; or (2) against the body of such party, in the cases authorized by law."

The statutes are silent as to the cases in which a body execution may issue in this State. It is there-

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fore necessary to determine the question from an examination of the precedents arising under the common law.

In an early case *(Fuller* v. *Bowker,* 11 Mich. 204), Justice CHRISTIANCY used the following language at page 210:

"We understand the common-law rule to have been that a *capias ad satisfaciendum* could be issued in those cases, and those [cases] only, in which the suit might have been commenced by *capias ad respondendum,* or, in other words, when the latter was the immediate process upon the original writ. The only exception to this seems to have been when the defendant was an attorney or officer of the court; in such case he might be taken in execution, though sued by bill. 2 Arch. Pr. 276. Originally the *capias ad satisfaciendum* lay at common law only in trespass *vi et armis.* But as statutes were subsequently passed, giving the *capias ad respondendum* as the mesne process in other cases, the *capias ad satisfaciendum* was held to follow, as a common-law incident. But in no case was the latter allowed without the former unless directly authorized by statute. 1 Sellon's Pr. 513; Comyn's Dig. Execution, c. 9; Tomlin's Law Dict. title 'Capias;' 1 Arch. Pr. 276."

In 1 Sellon's Practice, p. 513, cited by Judge CHRISTIANCY, it is said:

"A *capias ad satisfaciendum,* by the common law, lay only in trespass *vi et armis,* being a direct and wilful wrong, and wherein the *capias ad respondendum* was the immediate process upon the original writ. But several statutes having given the process of *capias ad respondendum,* as the mesne process upon the original writ in other personal actions, than those committed *vi et armis,* the *capias ad satisfaciendum* has become an executory process in them also, it being held as a rule that, where a capias lies in process before judgment, it will lie in execution upon the judgment itself."

In 1 Burrill's Practice, p. 308, we find the following:

"It may be considered a general rule, that a *capias*

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ad satisfaciendum will lie in all cases where a (bailable) *capias ad respondendum* might have been used as the process to bring the defendant before the court"—citing 1 Arch. Pr. 303.

In 1 Tomlin's Law Dictionary, at page 287, after describing the writ, the writer says:

"Properly speaking, this writ cannot be sued out against any but such as were liable to be taken upon the capias mentioned in the preceding article"—citing 3 Rep. 12; M. O. 767. See, also, 2 Tidd's Practice (2d Am. Ed.), p. 1025; Graham's New York Practice, p. 410.

In 4 Comyn's Digest, at page 228, we find the following:

"So execution may be by *capias ad satisfaciendum* against the body of the defendant in all cases where a *capias ad respondendum* lies in process."

Our Constitution, art. 2, § 20, provides:

"No person shall be imprisoned for debt arising out of or founded on a contract, express or implied, except in cases of fraud or breach of trust, or of moneys collected by public officers or in any professional employment. No person shall be imprisoned for a military fine in time of peace."

It is obvious that the plaintiff in the principal case might have proceeded against relator under the Constitution as well as under the statute cited, *supra*, by causing to issue a writ of *capias ad respondendum* as commencement of suit. Should she now be deprived of her right to the writ of *ca. sa.* because of having chosen the less drastic writ for her mesne process? We are of the opinion that she should not.

In the case of *Hunt* v. *Burdick*, 42 Vt. 610, it is said:

"There is nothing in our statutes or practice that requires the establishment of a rule that the plaintiff in an action of tort shall be deprived of the right, which the law gives him, of taking an execution

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against the body of the judgment debtor, because he omits to issue his original writ against the body. What operates so manifestly as matter of ease and favor to the defendant, ought not to be the ground of forfeiture of the rights of the plaintiff."

The case of *Lapham* v. *Oakland Circuit Judge*, 170 Mich. 564 (136 N. W. 594), cited on behalf of respondent as authority, is not controlling for the reason that in that case the question considered was only whether the body execution had been seasonably issued. The basic right of the plaintiff to the writ was not questioned.

The writ is denied.

McALVAY, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

BERSTON *v.* GILBERT.

1. CONTRACTS—ILLEGALITY—SUNDAY—VENDOR AND PURCHASER.
   A contract for the sale of land that was executed on Sunday is void under 2 Comp. Laws, § 5912 (2 How. Stat. [2d Ed.] § 5261), although dated on the preceding Saturday, and cannot be ratified upon a secular day.

2. SAME—PAYMENT—POSSESSION.
   Where a land contract was void because the parties executed it on Sunday, the purchaser could not create a new and distinct agreement by taking possession of the premises and building on them, or by making payments under the contract; because the acts relied upon were done under the provisions of the void instrument.

3. AMENDMENT—CONTRACTS—EQUITY.
   The trial court did not commit an abuse of judicial dis-

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cretion by granting permission to the defendant at the hearing to amend his answer so as to set up the alleged illegality, where a showing was made that satisfied the court.

Appeal from Genesee; Wisner, J. Submitted April 21, 1914. (Docket No. 88.) Decided June 1, 1914.

Bill by Neil J. Berston against Julius Gilbert for the forfeiture and cancellation of a land contract. From a decree for defendant, complainant appeals. Affirmed.

Black & Roberts, for complainant.

Clark M. Johnson (William E. Barrett, of counsel), for defendant.

BROOKE, J. The bill of complaint in this cause is filed for the purpose of canceling a land contract made between complainant and defendant by the terms of which lot No. 14, block No. 5, in Parkland addition No. 2 of the city of Flint, was sold to defendant for the sum of $550, payable $3 cash and $1 per week. Complainant likewise prays for an injunction directed to the defendant, commanding him to refrain from removing or attempting to remove the dwelling house erected upon said lot by said defendant. The record shows that while this contract was dated the 13th day of November, 1909, it was in fact executed upon a Sunday. Various payments were made thereon until defendant had paid in all $54. All of said payments with a single exception were likewise made upon Sundays. Defendant was in arrears 69 weeks at the time complainant served notice upon him in accordance with the terms of the contract to terminate the same. The learned chancellor who heard the case entered a decree dismissing complainant's bill, upon the ground that the contract was illegal, being made upon a Sunday, and that it was not ratified by the fact

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that a single payment was made thereon upon a secular day, a receipt therefor having been given at the same time by the complainant.

In this court complainant claims that a new contract was created by the acts of the defendant in going into possession of the lot in question and building a house thereon and in making payments to the complainant from time to time. It is, we think, apparent that whatever was done by the defendant or the complainant was done in reliance upon the contract upon which complainant bases his action, and not upon any new contract. It is not disputed that this contract was in fact made upon Sunday, though dated upon the Saturday preceding. Such a contract is void under section 5912, 2 Comp. Laws (2 How. Stat. [2d Ed.] § 5261), and cannot be ratified upon a secular day. *Benedict* v. *Bachelder*, 24 Mich. 425 (9 Am. Rep. 130); *Pillen* v. *Erickson*, 125 Mich. 68 (83 N. W. 1023); *Acme Electrical Illustrating & Advertising Co.* v. *Van Derbeck*, 127 Mich. 341 (86 N. W. 786, 89 Am. St. Rep. 476).

Complainant assigns error upon the action of the circuit judge in permitting an amendment to the answer during the hearing, setting up the defense that the contract was made upon a Sunday, and therefore void. A showing was made which was apparently satisfactory to the circuit judge, and we are not prepared to say that his action evidences any abuse of discretion. His authority to permit amendments is based upon section 10268, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 12969), and Chancery Rule 16, subd. (*g*). Upon the allowance of the amendment complainant did not apply to the court for further time in which to prepare.

The decree must be affirmed.

McALVAY, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

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PEOPLE v. CONA.

1. CONSTITUTIONAL LAW — SEARCHES AND SEIZURES — EVIDENCE — WITNESSES—HOMICIDE—CRIMINAL LAW.

   Since it is the right and duty of the police to search any person who is taken into custody and his room or the place in which he may have been arrested, no constitutional right of a respondent was violated in searching his room and taking possession of two revolvers which were found there; nor was it erroneous, in a murder case, to require him to answer a question whether the weapons belonged to him.

2. WITNESSES—CROSS-EXAMINATION—MURDER.

   A respondent that took the witness stand in his own behalf, in a prosecution for the killing of a police officer, might be asked whether he had had trouble with the officers of the city at other times, as a preliminary to an inquiry into the matter of previous convictions.

3. CRIMINAL LAW—TRIAL—HOMICIDE—ARGUMENT.

   Where the respondent had denied that he had been convicted of any former offenses, and subsequently admitted that he had been arrested and convicted, the prosecuting attorney was entitled to comment in his argument upon the veracity of the accused and draw inferences from apparent inconsistent statements.

4. SAME—CONDUCT OF COURT—MURDER.

   Nor was it prejudicial to the rights of the respondent for the court, during the argument of the prosecuting attorney, to warn counsel for the accused not to interrupt but to take his exceptions.

5. SAME—NEW TRIAL.

   Held, also, that a new trial was not improperly denied upon affidavits of the defense wholly or partly met or contradicted by affidavits of the prosecution, relating to newly discovered evidence.

Error to the recorder's court of the city of Detroit; Phelan, J. Submitted April 23, 1914. (Docket No. 174.) Decided June 1, 1914.

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Francesco Cona was convicted of murder in the first degree. Affirmed.

Grant Fellows, Attorney General, *Hugh Shepherd*, Prosecuting Attorney, and *Arthur W. Kilpatrick*, Assistant Prosecuting Attorney, for the people.

Louis J. Colombo (Cassius Hollenbeck, of counsel), for respondent.

Respondent was convicted of the crime of murder in the first degree. The crime was committed about 8 o'clock in the evening of July 19, 1913, in the city of Detroit. The victim was Charles W. Schoof, a member of the metropolitan police force of that city. The circumstances surrounding the tragedy are depicted by witness George H. Raedle, as follows:

"I am an officer of the metropolitan police force. I was on duty the night of the 19th of July last. I met officer Charles W. Schoof that evening around 8 o'clock, a few minutes before 8, at Clinton and Hastings. After meeting him, we went through the alley between Clinton and Mullett and Hastings and Rivard. That alley runs east and west, parallel with Clinton. Officer Schoof and I entered the alley off Hastings street. He stayed in the middle of the alley for some purpose, and I walked down to the end of the alley on Rivard street. I saw these two men on the end of the alley on the other side of Rivard street. They were on Rivard street between Clinton and Mullett, one looking up Rivard street toward Gratiot avenue and the other looking the opposite side toward Clinton street. Cona was one of them. When I saw them I went back in the alley and told Officer Schoof. I told him I would go between the houses onto Mullett street, go down Mullett, and come in between the houses again, and intercept the men from the opposite side of the alley. He was to stay in the alley until he heard my signal, rapping a club. I went through between the houses onto Mullett, went east on Mullett five or six lots, and went in between the houses again into the alley where the men were, the alley between

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Rivard and Russell streets. Where I came back into the alley I was nearer Rivard than Russell. These two men were sitting on the tongue of a dirt wagon. Defendant was one of these two men. When I was between 50 and 60 feet away from them, I flashed my light and rapped my club at the same time and said nothing to them. They both started to run and ran west toward Rivard street. Officer Schoof came across Rivard street to the corner of the alley and tried to get hold of Cona, the defendant. I did not see the other man any more. As Schoof reached out his hand and tried to get hold of Cona, the shot was fired by defendant. I was then between 20 and 30 feet from Schoof and defendant. I could not say exactly; I did not measure it. After firing the shot defendant ran north on Rivard street to Mullett. Schoof fell there, right in the end of the alley. I ran after the defendant. I did not succeed in catching up to him. When I last saw him, he was in the middle of Mullett street between Hastings and Rivard. A crowd of people came there and obstructed my view of him when I got up to Hastings street. Just one shot was fired. After losing sight of the defendant, I went to the patrol box and called up the flying squadron. I then went back to where Schoof was lying and found that they had taken him away. I had never seen Cona before that evening. It was not over two minutes between the time I first saw them in the alley and the time Schoof was shot. I next saw the defendant in his home in bed, 2 o'clock Sunday morning. This was Saturday night. No words were spoken by me or Schoof during the time I saw these men in the alley. They said nothing to us. Schoof had not laid his hand on the defendant at the time the shot was fired. I assisted the central men, Graus and Roggers, in placing defendant under arrest at his home, 21 Fort street east. I went along with the officers from the central precinct. We found him there in bed. When I flashed my light on the defendant, I got a good look at him. There are two street lights around there. This happened around 8 o'clock. I met Schoof nearly 8 o'clock. This happened about four minutes afterwards. It was just beginning to get dark; it was in July."

Witness John J. O'Rourke, likewise a member of

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the police force, testified that he met defendant on the evening in question at 12 or 13 minutes to 8 at the corner of Orleans and Mullett streets, four blocks from the scene of the tragedy; that on that occasion he spoke to defendant; and that he had known him since July 5th.

Stephen J. Martin, a policeman, gave evidence to the effect that he found two revolvers in a sewing machine drawer in the house from which defendant was taken. This testimony was all that was offered on behalf of the people at the outset. The defendant was then sworn in his own behalf and on direct examination denied his guilt. On cross-examination he was shown the two revolvers and asked if they were his. Over objection he was permitted to answer that they were. To this ruling defendant excepted. The following then occurred:

"*Q.* Now, since you have been in Detroit, have you had any other trouble with officers, police officers?

"*Mr. Colombo:* Objected to as incompetent and immaterial.

"*The Court:* No, it is competent. (Exception for defendant.)

"*A.* No, I never had any trouble.

"*Q.* Didn't you have trouble with Officer O'Rourke, who was just on the stand?

"*A.* No, sir.

"*Q.* Did you ever see him before? Officer O'Rourke, will you stand up? I mean this officer here.

"*A.* I saw him at the station.

"*Q.* When?

"*A.* Yes, sir; he arrested me once, because of owing my mother money.

"*Q.* That was in the month of July, wasn't it?

"*A.* I don't remember when.

"*Q.* You threatened him and said you would get him, didn't you, shortly before the 19th of July?

"*A.* No, sir; I never threatened him. I always spoke to him nice. I never threatened him.

"*Q.* Have you ever been arrested and convicted of any offense?

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"*A.* No, sir."

Redirect examination: By *Mr. Colombo:* "*Q.* Wait a minute, Frank. Your mother had you arrested, and you went up to the House of Correction, and then she went up and paid your fine?

"*A.* Yes, she paid $60.

"*Q.* Your mother had you arrested, and then she thought she did you an injury, and then she went up and paid your fine?

"*Mr. Kilpatrick:* Never mind what she thought.

"*Mr. Colombo:* I am asking him; the mother must have told him about it.

"*Mr. Kilpatrick:* This is not competent, what his mother thought."

Recross-examination: "*Q.* So you were arrested and convicted?

"*A.* Yes, my mother had me arrested, and she paid the fine.

"*Q.* And you served some time in the House of Correction, didn't you?

"*A.* No, I didn't serve; paid the fine.

"*Q.* How long were you in jail?

"*A.* About three days.

"*Q.* You were fined about $35, weren't you—$50?

"*A.* I don't know; my mother paid $50 or $60.

"*Q.* Your mother paid $50 or $60. Weren't you arrested after your mother paid your fine, and did not the judge suspend sentence and tell you to move away from that neighborhood, that you were causing too much trouble?

"*Mr. Colombo* (to the interpreter): Give the answer.

"*A.* Yes, and I did move away.

"*Q.* Where were you living at that time?

"*A.* I do not remember the number; only lived there a little while.

"*Q.* What part of the city was it?

"*A.* Near the city hall. That is the nearest he can say.

"*Q.* Now, we have gotten you to admit this, that you were arrested and convicted, after you had denied it. Were there any other times that you were arrested and convicted?

"*A.* No, sir.

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"*Q.* Is there as much truth in that answer as the other answer you gave when you denied being—I withdraw that. How long have you had these revolvers?

"*A.* One of them I found, and the other one was given to me by a friend in New York, given me for a present, about three or four years ago.

"*Q.* So you have had one three or four years. How long since you found the other one?

"*A.* I don't remember. I found it in the country somewheres.

"*Q.* Since you came to Detroit?

"*A.* I found it in New York.

"*Q.* That is all."

Redirect examination: "*Q.* Frank, these two times you were arrested was because you and your mother had a few words?

"*Mr. Kilpatrick:* I object to that, your honor.

"*The Court:* I sustain the objection.

"*Mr. Kilpatrick:* That will be trying this case over again.

"*Q.* What were you arrested for, assault and battery, or what was the nature of the offense?

"*The Court:* If you are going to inquire about these former arrests, my brother, the best thing would be to bring up the records of the court below, because you cannot give oral testimony of convictions. Bring up the complaints and the papers from the other courts.

"*Mr. Colombo:* I can ask him what the nature of the offense was, can't I?

"*The Court:* The complaint is the best evidence; that would be only hearsay.

"*Mr. Colombo:* He brought it out; I want to show the nature of the offense.

"*Q.* Frank, this gun here is no good, is it?

"*A.* No, sir."

Defendant then introduced the evidence of several witnesses which, if true, tended to establish an *alibi.* The people then recalled the witness O'Rourke, who gave testimony to the effect that he had arrested the defendant on the 7th day of July, preceding the homi-

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cide, and appeared in court against him; that on that occasion the defendant threatened him:

"He looked at me and shook his finger a little bit and called me a name, and said he would get me. He called me a son of a bitch, and said he would get me. * * * I have seen him several times since the 5th of July and am positive that I saw him near the corner of Mullett and Orleans on the evening of the 19th of July."

The foregoing constitutes practically all the testimony offered in the case.

During the closing argument of the assistant prosecuting attorney, the following occurred:

"*Mr. Colomobo:* I take an exception to the statement of Mr. Kilpatrick that the defendant has shown himself to be a self-confessed liar. I take an exception to that statement.

"*The Court:* Just a moment. You may argue, the prosecuting attorney may argue, the statement made by the defendant; but I won't permit any statement of that kind to be made. Besides the counsel for defendant went far in his statement to the jury, when he said, if he was the prosecuting attorney, he would take this case from the jury.

"*Mr. Kilpatrick:* That is what I am answering now.

"*The Court:* He said counsel for the defendant had no right to make any such statement, and I am telling counsel for defendant now that, as a matter of law, the prosecuting attorney would not have any right to do anything of the kind.

"*Mr. Colombo:* I said I would recommend the case be taken from the jury.

"*The Court:* I don't see how that is possible—my brother is familiar with the criminal law—how that is possible in view of the statement here of the testimony of one of the police officers, who positively identified this man.

"*Mr. Colombo:* Only, your honor, as being so improbable in view of the other testimony.

"*The Court:* I know, but it is the jury that determines those questions, and not the prosecuting attor-

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ney or you, or myself. That is what these twelve men are sitting here for. You may proceed, Mr. Prosecutor.

"*Mr. Kilpatrick:* I say to you, gentlemen of the jury, that I would be highly derelict in my duty if I had done what my brother says I should have done, in the face of the testimony submitted by the people, when the testimony that rebuts that is the kind it is. Now, what did the defendant testify to? And didn't he perjure himself when I asked him if he had ever been arrested and convicted, and what did he say? 'No.' Finally we dragged out of him an admission that he had been convicted once. Didn't he perjure himself when he denied that?

"*Mr. Colombo:* Give me an exception.

"*Mr. Kilpatrick:* Then dragged out of him an admission, after he denied it, of another conviction, and didn't he perjure himself when he denied that conviction? (Exception for defendant.) So I say to you, gentlemen of the jury, that I am justified when I say that he is a self-confessed perjurer. Now, there is one of those witnesses that has testified to an *alibi* for the defense, whose testimony you are justified in throwing out, and not believing at all, and they have not shown anything here that would justify us in throwing out the testimony of Officer O'Rourke, or Officer Raedle, and I say it is not very good taste in my brother to stand up here and call Officer O'Rourke a liar, and Officer Raedle a liar, and advance the theory to you that they are simply coming in here and telling this story from fear of their superior officers. I say that is all poppy-cock. I would not have much respect for the police department of the city of Detroit or for the officers in charge of this department, if they will allow their subordinates to put anything over on them like this. (Exception for defendant.) And I challenge the statement of my brother that O'Rourke is a liar, when he comes in here and says positively he identifies this man, and knew it was the same one, four blocks from where the crime was committed. My brother asks me a question, 'What was the motive of this man?' I will answer that, first of all, by asking you another question, What was his motive when he tried to kill his whole family, his own flesh and blood? What motive would he have then?

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(Exception for defendant.) Because he is a depraved character; that is the reason. (Exception for defendant.) Yes, exceptions don't prove anything.

"*Mr. Colombo:* They will in the Supreme Court, if we go there.

"*Mr. Kilpatrick:* Take every exception you want. You know that is the testimony drawn out on your own cross-examination of Officer Roggers, that this man tried to kill his whole family; at least, his family told the officer that. That is the kind of a man he wants you to believe. The other people, we don't know who they are; we don't know what they are.

"*Mr. Colombo:* No, you don't want to know.

"*Mr. Kilpatrick:* Are you going to continue to interrupt me: I will appeal to the court.

"*Mr. Colombo:* Well, be fair.

"*Mr. Kilpatrick:* I did not interrupt you.

"*The Court:* Now, listen; no more interruptions. Take your exceptions to his argument, if you have got any to make. He didn't interrupt you. Let him finish.

"*Mr. Colombo:* I take an exception.

"*Mr. Kilpatrick:* The motive, the theory that the people have worked on in the case, is this, gentlemen of the jury: We won't say that the defendant took a violent dislike to Officer O'Rourke alone; he may have done that. The two beats ran together, and he may have taken such a dislike to O'Rourke that in the excitement and suddenness of Schoof coming up there, he thought it was O'Rourke, and he pulled the revolver and shot him dead. That may have been it from what we have learned here today of the character of this man, it is fair to assume that he took a violent dislike to the whole police force, just the same as he did to his whole family, and that he was ready with this revolver that he claims that he carried for four years or so (exception for defendant) to shoot down on the slightest provocation. (Exception for defendant.) Now there are two motives. That is, the dislike to Officer O'Rourke, because he arrested him the other time, because he would not go back with him, especially taking into consideration the fact that he had threatened him. Of course, my brother says O'Rourke is not to be believed, I suppose, on that; but I believe him. I believe him, and I believe he did

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threaten him. Now, that is one theory of the prosecution. The other is that because of his being mixed up, as he was, with the police department on different occasions, because of his depraved character, he took a violent dislike to the whole police force. (Exception for defendant.) And therefore, when Schoof suddenly appeared at the entrance of that alley, he pulled his gun and shot him, rather than be taken in, as he had been on two previous occasions. Now, gentlemen of the jury, you have heard the testimony of these officers in front of you. It makes out an absolute case against the defendant, and you have this *alibi* testimony, and I repeat again, and ask you to do, as I think the court will instruct you, to consider that testimony very, very carefully, because it is easy to prove and hard to disprove; and think, also, gentlemen of the jury, of the interests of these witnesses in this case. They have an interest; they want to see their man free. (Exception for defendant.)

"*Mr. Kilpatrick:* They do not care how far they go. (Exception for the defendant.)"

After conviction respondent made a motion for a new trial based principally upon the claim of newly discovered evidence. Several affidavits were filed in support of the motion; the general tenor of which being that the several affiants had seen a man running away from a policeman with a revolver in his hand immediately after the tragedy, and that the respondent was not that man. In denying the motion for a new trial, the court said:

"Counsel for defendant has filed the affidavits of Hattie Eisenstark, Mrs. Dora Webber, Arthur N. Webber, Mrs. Benjamin Behrman, Leo Fritz, Mrs. Schremser, Pellero Cemero, and Paul Krueger, which tend to prove that on the night in question they saw a man run along Rivard and other streets in the vicinity; that he had a revolver in his hand, but it was not defendant Cona. These affidavits may or may not be true.

"Officer Raedle claimed that he positively identified the defendant when he saw him 25 or 30 feet away; that he had good light from Rivard and Clinton streets

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100 feet away, and also good light from Mullett street on Rivard. Officer O'Rourke positively identifies the defendant as the person with whom he spoke on the southwest corner of Orleans and Mullett and states the defendant was then walking towards Rivard street.

"I have given the matter careful consideration, because of the seriousness of the offense and the punishment which it carries, life imprisonment, and I do not find anything in the affidavits filed on behalf of the defendant, asking for a new trial, which would justify me in setting aside the verdict of the jury.

"The defendant had a fair and impartial trial, and was defended by a learned counselor of the law. The killing was as brutal as it was cowardly. It is a felony under the law of this State, since 1911, for persons to carry dangerous weapons upon their persons, concealed, without a license, and many officers have been killed when approaching men for the purpose of ascertaining whether they are so armed. I am satisfied from a careful examination of all the evidence in this case that Officer Schoof met his death while attempting to learn whether the defendant at the bar was armed with a dangerous weapon on the night in question.

"The motion for a new trial is overruled."

An exception was taken by defendant to this ruling.

BROOKE, J. *(after stating the facts).* There are 18 assignments of error. The first two relate to the ruling of the court in permitting the witness Martin to answer the question, "I will ask you whether or not you found these revolvers there?" and in compelling the defendant Cona to answer the question, "And they are your guns, aren't they?" It is urged on behalf of defendant that the seizure of the revolvers in question was in violation of the Federal Constitution, citing *Weeks* v. *United States,* 232 U. S. 383 (34 Sup. Ct. 344). A reading of the opinion in that case makes it apparent that the principles there announced and relied upon by the defendant are not applicable in the case at bar. *People* v. *Adams,*

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176 N. Y. 351 (68 N. E. 636, 63 L. R. A. 406, 98 Am. St. Rep. 675); *Smith* v. *Jerome*, 47 Misc. Rep. 22, 93 N. Y. Supp. 202. In the latter case it is said:

"The police have the power and it is also their duty to search the person of one lawfully arrested, and also the room or place in which he is arrested, and also any other place to which they can get lawful access, for articles that may be used in evidence to prove the charge on which he is arrested."

The third assignment is based upon the ruling of the court in requiring the defendant to answer the question, "Now since you have been in Detroit have you had any other trouble with the officers, the police officers?" We are of opinion that the defendant having offered himself as a witness in his own behalf could be interrogated as to his former convictions, and the question objected to was, as shown by the testimony quoted, simply preliminary to that investigation.

Assignments of error 4, 5, 6, 7, 8, and 9 refer to alleged improper argument made by the prosecuting attorney on behalf of the people. That argument has been set out in the statement of facts. Defendant bases these exceptions upon the cases of *People* v. *Quick*, 58 Mich. 321 (25 N. W. 302); *People* v. *Treat*, 77 Mich. 348 (43 N. W. 983); *People* v. *Lieska*, 161 Mich. 630 (126 N. W. 636); *People* v. *Huff*, 173 Mich. 620 (139 N. W. 1033). There can be no difference of opinion as to the ruling announced in these cases. It is the duty of the prosecutor to protect the innocent as well as to pursue the guilty and to maintain an impartial attitude in the conduct of his case. But this court has never held that it is improper for the prosecutor to comment upon the testimony in the case and to draw warrantable inferences therefrom. *People* v. *Winslow*, 39 Mich. 505; *Driscoll* v. *People*, 47 Mich. 413 (11 N. W. 221); *People* v. *Welch*, 80 Mich.

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616 (45 N. W. 482); *People* v. *Hess*, 85 Mich. 128 (48 N. W. 181); *People* v. *Tubbs*, 147 Mich. 1 (110 N. W. 132).

In the sixth assignment of error a further complaint is made of the language of the trial judge in admonishing counsel for defendant in these words:

"Now, listen; no more interruptions. Take your exceptions to his argument if you have got any to make. He didn't interrupt you. Let him finish."

That portion of the argument of the prosecutor set out in the statement of facts indicates very frequent interruptions on the part of defendant's counsel and may be held to justify the statement by the court. A similar remark by the court in the case of *People* v. *Ecarius*, 124 Mich. 616 (83 N. W. 628), was held to be insufficient upon which to order a new trial.

Assignments of error numbers 10 to 13, inclusive, are based upon alleged erroneous instructions to the jury. No requests to charge were preferred on behalf of the defendant. A careful examination of the charge convinces us that the rights of the defendant were carefully guarded by the court. At the conclusion of the charge the court inquired of counsel for defendant if there was anything further he desired to have him charge, to which counsel responded: "That is all, your honor; thank you."

Error is assigned upon the refusal of the court to grant a new trial because of newly discovered evidence. We have examined the affidavits filed in support of that motion. They are all dated more than two months after the date of the homicide. Affidavits filed by the prosecution in opposition to the motion cast doubt upon some of the statements contained in the affidavits filed upon the part of the defense. In view of the positive identification of the defendant by Officer Raedle and the fact that he was seen in the vicinity of the scene of the crime within a few min-

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utes of the commission thereof, we cannot say that the trial judge abused his discretion in declining to grant the motion.

The conviction is affirmed.

McALVAY, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

PEOPLE *v.* KREIDLER.

1. CRIMINAL LAW — NEGLIGENCE — CARELESS USE OF FIREARMS — WEAPONS—STATUTES.

   Under 3 Comp. Laws, § 11510 (5 How. Stat. [2d Ed.] § 14559), providing that "any person who shall discharge without injury to any other person, any firearm, while intentionally, without malice, aimed at or toward any person, shall be guilty of a misdemeanor," etc., acts carelessly done, without design to do mischief, are punishable.

2. SAME—"TOWARD"—CONSTRUCTION OF STATUTE.

   It is sufficient, in a prosecution for violating the statute, to show that the accused was making use of a rifle pointed in the direction of a passenger on a car and discharged the weapon in that direction, without striking any one. The word "toward" means in a course or line leading in the direction of.

3. TRIAL—ARGUMENT—CONDUCT OF PROSECUTING ATTORNEY.

   Argument of the prosecuting attorney, in the course of which he stated that there were better men now in State prison than the respondent, was not prejudicial error, in the absence of a showing in what connection the statement was made or what proposition the prosecuting attorney was discussing.

4. SAME—CHARGE.

   Where the accused claimed that it was his companion who

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fired off the rifle at the time alleged by the prosecution, and the general charge of the court submitted this issue to the jury, instructing them that the elements of the offense must be proved beyond a reasonable doubt, and unless they were satisfied beyond a reasonable doubt that the respondent did fire the rifle, they must acquit him, the instructions were sufficient.

Error to Macomb; Tucker, J. Submitted April 23, 1914. (Docket No. 171.) Decided June 1, 1914.

Clarence Kreidler was convicted of the improper use of a firearm and brings error. Affirmed.

Grant Fellows, Attorney General, *L. W. Carr*, Assistant Attorney General, and *Charles H. Hummrich*, Prosecuting Attorney, for the people.

Silas B. Spier (William F. Sawn, of counsel), for respondent.

MCALVAY, C. J. Respondent was convicted under an information charging him with the careless use of firearms. A motion for a new trial was made in his behalf and denied. The case is before this court upon a writ of error under which numerous errors are assigned, which include errors assigned upon the refusal to grant a new trial.

The facts appear to be that respondent, a young man 19 years old, and a companion aged 22, on August 16, 1913, went from Detroit out to the residence of a Mr. Green on the line of the Rapid Railway Company, near the village of New Baltimore. His companion had a Flobert rifle carrying No. 22 short cartridges for the purpose of shooting sparrows. This electric line of the Rapid Railway Company passes within about 150 feet of Mr. Green's house. These young men were in a berry patch between the house and the railway track, along which at the time a car full of passengers was passing. The claim of the prosecution is that respondent at this time and place

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"did discharge, without injury to any other person, a firearm while intentionally without malice, aimed at or toward one John H. Sinclair." Mr. Sinclair was a passenger in the car. The bullet fired from this rifle imbedded itself one-half inch in the window post in front of the seat where he was sitting, and slivers flew and hit him in the face under his eye.

The defense interposed on the part of respondent was that the shot was not fired by him, but by the young man who was with him, and that there was no evidence in the case which would justify the jury in finding that, if respondent fired the shot, he intentionally aimed the rifle at any person in the car. The offense with which respondent is charged is a statutory offense; the statute being section 11510, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 14559), which is section 2 of an act entitled "An act to prevent the careless use of firearms." It reads:

"SEC. 2. That any person who shall discharge, without injury to any other person, any firearm, while intentionally, without malice, aimed at or toward any person, shall be guilty of a misdemeanor, and shall be liable to a fine of not less than one hundred dollars, or imprisonment in the county jail not to exceed one year, or both, at the discretion of the court."

The entitling of this act indicates clearly its purpose. It must be held to have been designed to punish acts done carelessly, without design of doing mischief. *People* v. *McCully*, 107 Mich. 343 (65 N. W. 234).

It is claimed on the part of the prosecution, and there was evidence in the case tending to show, that respondent was using this rifle, was pointing it in the direction of Sinclair, who was in the passing car, and fired it, with the result already stated. Upon this proposition the claim of the respondent has already been stated. This was a question of fact to be submitted to the jury, and has been determined by it against respondent.

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It is not necessary to sustain a prosecution under this section of the statute to show that the firearm used was aimed at any person. It is sufficient if it be pointed "*toward* any person." The definition of the word "toward" is, "in a course or line leading to, in the direction of." There is proof in this case tending to show that respondent held this firearm pointed directly at this car loaded with passengers, of which Sinclair was one, and deliberately fired it. There was evidence, if believed by the jury, to sustain every element of this statutory offense.

Consequently, the errors assigned upon the denial of the motion for a new trial are without merit, so far as the matter of the evidence is concerned, and was properly denied, unless we find that upon the trial of the case, or in the charge to the jury, or in refusals to give respondent's requests, error was committed by the court. We find, from an examination of the errors assigned upon the admission and exclusion of evidence, that none of them are meritorious.

The record shows that an exception was taken to a claimed statement of the prosecutor in his argument that "there are better men now in State's prison than Kreidler." This is followed by a statement by the court, "He said 'perhaps there were.'"

The record does not show the connection of the statement with the argument made or what proposition the prosecutor was discussing, and such a statement might be made without prejudice, if he were discussing the reckless carelessness with which firearms are used on occasions like the one in the instant case. Such use of firearms all too frequently results in homicide. A very small per cent. of the inmates of our prisons are there for offenses of that character.

Including the 16 grounds for a new trial, there are nearly 50 assignments of error. These, not including those already considered, are upon the refusals to

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give respondent's requests to charge, and upon portions of the charge as given. In his main charge the court gave in substance all of the requests of respondent which could be properly given. This charge of the court must be considered as a whole, and, so considering it, we find that it directed the jury that the elements of the offense charged must be proved beyond a reasonable doubt, and, "unless you are satisfied beyond a reasonable doubt that the defendant Kreidler did fire the gun as claimed, it will be your duty to acquit him." This charge also gave all the necessary protection which the law requires should be given to a man accused of crime, and correctly stated the law in the case to the jury. The verdict was warranted by the evidence in the case.

The conviction is affirmed.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

BOARD OF SUPERVISORS OF THE COUNTY OF JACKSON *v.* BOARD OF STATE AUDITORS.

1. STATES—LIABILITY TO COUNTIES FOR COSTS OF CRIMINAL PROSECUTION—PRISONS—INMATES.

   The State is not liable to Jackson county for costs of a criminal prosecution of one of the inmates of the State prison at Jackson for burning a warehouse of that institution.

2. STATUTES—COSTS—REPEAL BY IMPLICATION.

   The provisions of Act No. 132, Pub. Acts 1887, that costs of a prosecution of any inmate of the State penal institutions should be paid by the State, were repealed by

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Act No. 118, Pub. Acts 1893 (5 How. Stat. [2d Ed.] § 15268 *et seq.*), which re-enacted the former statute without including the provision in question and repealed inconsistent acts.

Mandamus by the board of supervisors of Jackson county against the board of State auditors to require respondents to allow and audit a bill of costs in a criminal case. Submitted April 21, 1914. (Calendar No. 26,098.) Writ denied June 1, 1914.

Reuben H. Rossman, Prosecuting Attorney, for relator.

Grant Fellows, Attorney General, for respondent.

MCALVAY, C. J. Relator asks for a writ of mandamus to compel respondent to audit and allow a certain bill of costs incurred by it upon the trial in the circuit court for Jackson county of a certain criminal prosecution against Joseph Davidson, respondent, who was at that time a convict confined in the Michigan State prison at Jackson in said county, upon a certain information in due form, charging him with setting fire to and burning a certain warehouse within the walls of said prison on October 24, 1912. The itemized claim of relator was duly presented to respondent board for allowance, and such board refused to audit and allow the same. The only question in the case is whether the statute which provided for the payment of costs and expenses incurred in the prosecution and trial of such cases has been repealed.

The statute in question was Act No. 132, of the Public Acts of 1887, entitled:

"An act to provide for the punishment of crimes committed by any person while confined or before the expiration of his sentence in any of the penal institutions of this State."

Section 1 of this act provided that any convict confined in the penal institutions named therein, who

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should commit any crime punishable under the laws of this State should be subject to the same punishment "as if the crime had been committed at any other place, or by a person not so confined." Section 2 gave the circuit court for the county where the crime was committed jurisdiction over the case, and provided that the proceedings thereto pertaining should in all ways conform to the law and rules applying to such cases, except that the examination might be held in the office of the penal institution, and the convict so charged should continue to remain in the custody of the warden. Section 3 provided for the sentence which might be imposed upon conviction. Section 4, which is the section under which the liability of the State is claimed, provided as follows:

"All costs and expenses incurred under the provisions of this act, except pay of circuit judges and prosecuting attorneys, shall be paid by the State of Michigan."

The legislature later passed an act designed to consolidate in one act the provisions with reference to the management, government, and discipline of the various penal institutions of the State. This is Act No. 118 of the Public Acts of 1893 (5 How. Stat. [2d Ed.] § 15268 *et seq.*), which is entitled:

"An act to revise and consolidate the laws relative to the State prison, to the State house of correction, and branch of the State prison in the Upper Peninsula, and to the house of correction and reformatory at Ionia, and the government and discipline thereof and to repeal all acts inconsistent therewith."

By this later act sections 1 and 2 of the act of 1887 were substantially re-enacted by sections 64 and 65, and are therefore repealed. Section 3 of the earlier act, which provided for the imposition of the sentence in case of a conviction, was not repealed. Relator contends that section 4, upon which its claim is found-

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ed, was not repealed. The repealing section of the later act reads as follows:

"SEC. 66. All acts and parts of acts contravening any of the provisions of this act are hereby repealed; but all proceedings pending, and all rights and liabilities existing, acquired or incurred at the time this act takes effect, are hereby saved, and such proceedings may be consummated under and according to the law in force at the time such proceedings were commenced."

The later act of 1893 has been twice before this court for construction, first in the case of *Attorney General, ex rel. Fuller,* v. *Parsell,* 100 Mich. 170 (58 N. W. 839), which had already been twice construed (see 98 Mich. 96 [57 N. W. 33], and 99 Mich. 381 [58 N. W. 335]), where this court said:

"The very terms 'revise' and 'consolidate' imply the intention to include in such act entire control over the subject, and to exclude all prior enactments. Cooley, Const. Lim. (6th Ed.) 182, note 4. The act in question contains 66 sections, and its provisions cover the entire management and control of and discipline in the penal institutions named. There is not a single provision of the former laws which is requisite or necessary for the management and control of these institutions.

"But it is argued that the language in the repealing clause, that 'all acts and parts of acts contravening any of the provisions of this act are hereby repealed,' indicates an intention to retain those provisions of the old law which may be held not to conflict with the new. We are of the contrary opinion. It would be unreasonable to hold that the legislature, while covering the entire subject, and declaring its intention to be to revise and consolidate all the laws upon the subject, intended to leave in force any provisions of the former laws which the courts might determine did not contravene the provisions of the new act.

"But, however this may be, the repealing section, when read as a whole, shows the understanding of the legislature to be that the revised and consolidated act

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should supersede all other acts upon the subject. The repealing section closes with these words:

"'But all proceedings pending, and all rights and liabilities existing, acquired, or incurred, at the time this act takes effect, are hereby saved, and such proceedings may be consummated under and according to the law in force at the time such proceedings were commenced.'"

Later, in the case of *People* v. *Huntley*, 112 Mich. 569 (71 N. W. 178), the question was considered whether section 3 of the act of 1887 was repealed by the act of 1893. This court said:

"But it is contended by counsel for respondents that this section of the act of 1887 was repealed by Act No. 118, Pub. Acts 1893. The act of 1893 was a revision and consolidation of the former acts, and to repeal all acts inconsistent therewith. While the general rule is that statutes and parts of statutes omitted from a revision are to be considered annulled, and not to be revived by construction, yet there are many exceptions to this rule. A revisal repealing all acts repugnant to the provisions thereof cannot affect statutes which are omitted, and which are not repugnant to its provisions. *State* v. *Pollard*, 6 R. I. 290. The rule of implied repeal is clearly inapplicable also where the revising statute declares what effect it is intended to have upon the former law, as where it declares that it shall operate as a repeal of such provisions of earlier acts as are inconsistent with it, which is regarded as a declaration that it shall repeal only such provisions and leave unaffected such as are not inconsistent. End. Interp. Stat. § 203; *Patterson* v. *Tatum*, 3 Sawy. 164 [Fed. Cas. No. 10,830]; *Lewis* v. *Stout*, 22 Wis. 234; *Gaston* v. *Merriam*, 33 Minn. 271 [22 N. W. 614]. Applying these rules to the present case, it must be held that section 3 of the act of 1887 was not repealed."

A further reason why section 3 was not repealed is because it is not only not repugnant to the provisions of the repealing statute, but is in harmony with it, and it must be considered that the legislative intent was not to repeal this section and leave the re-

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pealing statute without any provision for imposing sentence in case of a conviction. A careful examination of both these cases will show that they are not inconsistent with each other. The question raised in the instant case relative to the status of section 4 of the earlier act was not considered in either of these decisions. It reads:

"All costs and expenses incurred *under the provisions of this act*, except pay of circuit judges and prosecuting attorneys, shall be paid by the State of Michigan."

"The provisions of this act" referred to in this section, being sections 1 and 2, were repealed by reenactment in the later act, leaving no provisions in the act under which costs and expenses could be incurred. We also find the legislative intent not to re-enact this section, but to repeal the same, to be clear from the saving clause in the repealing section of the later act, providing for all liabilities already incurred, as follows:

"* * * But all proceedings pending, and all rights and liabilities existing, acquired or incurred at the time this act takes effect, are hereby saved. * * *"

The "liabilities existing, acquired or incurred, at the time this act takes effect" would include "all costs and expenses incurred under the provisions of this act," to be paid by the State of Michigan. It follows that at the time the later act was passed the legislature had in mind the costs and expenses which had accrued in cases already incurred, and refused to continue the liability against the State in subsequent prosecutions under the statute.

This court, therefore, holds that section 4 of Act No. 132, Pub. Acts 1887, was repealed. The writ of mandamus is denied, but without costs to either party.

BROOKE, KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

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PEOPLE *v.* DAMSKEY.

1. INTOXICATING LIQUORS—SALOONS—SUNDAY.
   The statute (2 Comp. Laws, § 5395, 2 How. Stat. [2d Ed.] § 5074), makes it incumbent on one who conducts a saloon for the retailing of intoxicating liquors to keep it closed on Sunday, at his peril.[1]

2. SAME—TRESPASSER—INTENT.
   The act of a hotel keeper's son in entering his barroom, run in connection with the hotel, to obtain a wrench on Sunday, the son being married and living away from home but having freedom of access to saloon and hotel, and retaining a key of the saloon, rendered the proprietor liable to criminal prosecution under the statute, since the son was not a trespasser.

3. SAME—CONSTITUTIONAL LAW—JURY TRIAL.
   Upon the uncontradicted facts admitted by the respondent, the trial court was justified in charging the jury that he was guilty, permitting the jurors to retire and make up their verdict; no question of intent was involved which raised any issue of fact.

Exceptions before sentence from the superior court of Grand Rapids; Stuart, J. Submitted April 23, 1914. (Docket No. 167.) Decided June 1, 1914. Rehearing denied December 19, 1914.

Frank S. Damskey was convicted of violating the law relating to the keeping of saloons closed on Sunday. Affirmed.

Grant Fellows, Attorney General, *Earl F. Phelps*, Prosecuting Attorney, and *Louis T. Herman*, Assistant Prosecuting Attorney, for the people.

Lombard, Hext & Washburn, for respondent.

[1] As to opening saloon during prohibited hours for purposes other than sale of liquor, see note in 36 L. R. A. (N. S.) 167.

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BIRD, J. The respondent, who was the proprietor of the Western Hotel in the city of Grand Rapids, was informed against and convicted of the offense of failing to keep his saloon closed on a certain Sunday in August, 1913. To establish the guilt of the respondent, the people showed that respondent's son was in the saloon on the day in question. This was admitted by the respondent, but he insisted that the act of the son in entering the saloon was without either his knowledge or consent, and that in so doing the son was a trespasser, for whose act he would not be responsible.

It appears that the son was 24 years of age, that he was married, and that he neither lived nor was employed at the hotel. He had previously, while living at home, worked in the saloon, and at one time, while he was at school, the license was taken out in his name, but for two years previous to this happening he had had no connection with it, although it appears that he had retained a key to the barroom. He testified that on the Sunday in question he came from his home to the hotel to get his motorcycle; that in making repairs on it he needed a wrench, and, being aware that his father kept one among his tools behind the bar, he unlocked the door and went into the saloon and got it.

It is urged on behalf of respondent that under these circumstances the son was a trespasser, and, if he were, respondent was wrongfully convicted. The statute makes it incumbent upon one conducting a saloon where intoxicating liquors are sold to keep it closed on Sunday (2 Comp. Laws, § 5395, 2 How. Stat. [2d Ed.] § 5074). In construing this section, this court has held that he must do so at his peril. *People* v. *Roby*, 52 Mich. 577 (18 N. W. 365, 50 Am. Rep. 270); *People* v. *Welch*, 71 Mich. 548 (39 N. W. 747, 1 L. R. A. 385); *People* v. *Lundell*, 136 Mich. 303 (99 N. W. 12); *People* v. *Kriesel*, 136 Mich. 80 (98 N. W. 850, 4 Am. & Eng. Ann. Cas. 5); *People* v. *Possing*,

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137 Mich. 303 (100 N. W. 396). Had it been established that the son was a trespasser on the Sunday in question, we should feel bound to give respondent's argument serious consideration, but we do not think it so appeared. Had the law been violated in like manner two years previous, while the son was living at home, there would have been no room for such a contention. It is quite evident that the relations which existed between him and his parents had changed but very little since his going away. He kept some of his property at the hotel and retained a key to the saloon. His entrée to the hotel appeared to be as free and unobstructed as though it were still his home. The freedom which he exercised in going into the saloon was based upon his relations with his parents. We do not think it can be said, under these circumstances, that the son was a trespasser, and especially in view of the fact that the respondent himself was then at the hotel.

Both sides asked for an instructed verdict. The trial court granted the prosecutor's request, and in doing so made use of the following language:

"Therefore, I will instruct you, there being no questions of fact in the matter to be decided, the court instructs you to find the respondent guilty. You will retire to your jury room and select a foreman and return with a verdict of guilty."

"In this case, the main question is, and the only question is, whether Mr. Damskey, the young man, by going in there made the respondent liable. The court holds that he did. You will return to the jury room and bring in a verdict of guilty."

Error is assigned on these instructions because it is said they deprived the respondent of his constitutional right to have a jury pass upon his guilt. In *People* v. *Neumann*, 85 Mich. 98 (48 N. W. 290), where a similar question was raised, the court said:

"Whenever there is no question of intent in a crim-

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inal case, and no inferences, about which reasonable men might differ, to be drawn from the facts, and where, upon the admitted facts, the only question to be determined is whether under the law the statute has been violated, the trial judge may, with perfect propriety, state to the jury that the law applied to the facts, which are undisputed, shows the defendant to be guilty of the offense charged, and that it is their duty so to find under the facts and the law."

It was conceded by both parties that there was no question of fact involved, and under the statute there was no question of intent involved. There was nothing for the trial court to do but to apply the law to the facts, and instruct the jury what their duty was in the premises. The jury were permitted to retire, and they returned with a verdict in accordance with their instructions. We think no error was committed. *People* v. *Gardner*, 143 Mich. 104 (106 N. W. 541).

The conviction is affirmed, and, as the case is here on exceptions before sentence, the trial court will proceed to judgment.

McALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

LICHTIG *v.* SAGINAW CIRCUIT JUDGE.

1. PUBLIC OFFICERS—SCHOOLS—PRESIDENT OF SCHOOL BOARD—ELECTION OR APPOINTMENT.

   Where the president of the Bay City school board vetoed the resolution of the board by which it was attempted to remove him from office and appoint a successor, and it appeared that the president had been duly elected and

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had exercised the veto power conferred upon him by Act No. 514, Local Acts 1903, the board failing to pass the resolution over the veto, such attempted removal and election to the presidency of the board was ineffective and the first elected president remained entitled to the office.

2. SAME — EDUCATION, BOARD OF — LEGISLATIVE OR ADMINISTRATIVE ACTION.

The provisions of the above mentioned act that "the president or vice president when acting as president may file with the clerk of the board his objections in writing to any by-law, ordinance, resolution, motion or order of the board within five days," etc., conferred the power upon such presiding officer to veto any action, legislative or administrative, of the board.

3. SAME—MANDAMUS—PRESIDENT OF SCHOOL BOARD.

While it is contrary to the practice of the Supreme Court to determine the right to hold office in a mandamus proceeding, an exception is made in this instance because of the pressing nature of the business before the board, and the fact that the president was entitled to the office both *de facto* and *de jure*.

Mandamus by Edward Lichtig against William G. Gage, Saginaw circuit judge, to compel the respondent to vacate an order dissolving an injunction in a suit brought by relator to restrain one J. W. Coles from exercising the office of president of the school board of the city of Bay City. Submitted April 28, 1914. (Calendar No. 26,216.) Writ granted June 1, 1914.

Joslyn & Houghton (Kinnane & Lane and *Charles Hitchcock,* of counsel), for relator.

L. G. Beckwith and *Stoddard & McMillan,* for respondent.

BIRD, J. The board of education of Bay City consists of nine members, who were all elected in October, 1912, for a term of two years. At their first meeting they elected relator president of the board. At the beginning of the present year, they fell into serious disagreement over a resolution to re-employ

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their present superintendent, and, at a meeting held on the 13th day of February, the following resolution was offered by Trustee Ribble:

"Whereas, the interests of education, the good government and prosperity of the schools of Bay City, and the welfare of the public concerning the same, require the election of a new president of this board, therefore resolved, that the said office of president be and the same is hereby declared vacant and that trustee J. W. Coles be and he is hereby elected president of this board."

The resolution was declared out of order by the president, and neither he nor the clerk would put it to a vote. Trustee Ribble then proceeded to call the roll himself, but, before it was concluded, a motion to adjourn was declared carried by the president, whereupon four members left the meeting. The other five remained until the roll call was finished, after which Trustee Coles took the chair and declared the resolution adopted. Thereafter both Lichtig and Coles claimed to be president of the board. On March 14th the relator Lichtig applied to and secured a temporary injunction from the circuit court in chancery, addressed to Coles, inhibiting him from attempting to exercise the duties of president and from interfering with the relator in the discharge of his duties as president. An answer was filed to the bill of complaint, and a motion to dissolve followed, which was granted by the trial court. We are now asked for a writ of mandamus to compel the circuit judge to set aside his order dissolving the injunction. The principal questions raised are:

(1) Had the board the power to remove the president?

(2) If they had such power, were the proceedings taken effective to accomplish that end?

Inasmuch as a solution of the second question will

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determine the case, we will refrain from discussing the first question.

2. The board of education at Bay City was created by Act No. 514 of the Local Acts of 1903. That act provides that at the first meeting after the members are elected in October, they shall elect a president and vice president. Section 256 of the act confers on the president the veto power in the following language:

"The president, or vice president, when acting as president, may file with the clerk of the board his objections in writing, to any by-law, ordinance, resolution, motion or order of the board within five days after the passage or adoption of the same, setting forth reasons for his disapproval thereof, and in such case such by-law, ordinance, resolution, motion or order shall not become operative or take effect unless again passed or adopted by a two-thirds vote of all the members elect."

Within the five days allowed by this section, the relator, as president, exercised the power therein conferred, and vetoed the resolution. The parties are in direct conflict as to the force of the veto. The respondent insists that the veto power conferred by this act is effective only against legislative acts, and that the appointment to office is not a legislative act, but an administrative one. The question as to whether the veto power extends to administrative as well as legislative acts is one which must, in the last analysis, be decided from the language of the act conferring it. 28 Cyc. p. 356. It will be noted that the language of this act is very broad, and appears to confer the power upon the president to veto any act, legislative or administrative, that does not meet with his approval. Had the legislature intended he should have this power, it is difficult to conceive how it could have been more aptly expressed than by the use of the terms which were employed. There is no official action (at least of any consequence) which the board could

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transact, which would not involve, in making it effective, one of the enumerated forms.

In the case of *People* v. *Schroeder*, 76 N. Y. 160, this question was before the court of appeals upon a legislative act, which provided:

"That every ordinance or resolution of the board of aldermen shall, before it takes effect, be presented and certified to the mayor, and, if he approves of it, he shall sign it and, if not, shall return it with his objections, when it may be passed by a vote of two-thirds of the members."

The court, in passing upon the question, said in part:

"The resolution of the common council confirming the appointment of the relator, which was transmitted to the mayor, and which he returned without his approval, comes directly within the terms of the provision last cited; and it follows that without such approval, the relator failed to receive a legal appointment as clerk. The object of the provision evidently was to give the mayor the power to veto all acts of the common council which did not meet his approval, and in this form to restrict improvident action by that body. It is no answer to this construction, I think, to say that the act of the common council was neither a legislative act, nor an ordinance, nor a resolution, because it was an act confirming an appointment, for its confirmation was not only in the form of a resolution, but that body had no authority to make the appointment valid without the approval of the mayor."

A similar question arose in *Baar* v. *Kirby*, 118 Mich. 392 (76 N. W. 754), over the veto by the mayor of the resolution of the council, transferring certain moneys from one fund to another. The power to veto was that conferred on mayors of fourth-class cities, and provided that:

"No ordinance or resolution passed by the council shall have any force or effect if, on the day of its passage, or on the next day thereafter, the mayor, or other officer or person legally discharging the duties

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of mayor, shall lodge in the office of the clerk a notice in writing suspending the immediate operation of such ordinance or resolution. * * *"

The same point was made in that case as is made in this that it was an administrative act, but the court held that the veto power extended to and covered the case. It was therein said:

"The claim that it was not a resolution which, under the statute, the mayor had the power to veto has no force. The statute provides that no ordinance or resolution passed by the council shall have any force or effect if the notice is given, and such ordinance or resolution shall not go into effect when the veto message is interposed within the time prescribed, unless the same is passed over the veto by a two-thirds vote of all the aldermen-elect."

We are cited to three cases in which a contrary holding is made: *Erwin* v. *Jersey City*, 60 N. J. Law, 141 (37 Atl. 732, 64 Am. St. Rep. 584); *State, ex rel. Haight*, v. *Love*, 39 N. J. Law, 14; *State* v. *Wagner*, 170 Ind. 144 (82 N. E. 466, 15 Am. & Eng. Ann. Cas. 1063). It will be found, upon examination of these cases, that the language of the several acts conferring the veto power differ materially from the one in question. In the first case cited, the mayor was given authority to veto the acts of any board of the city. In the second case, the mayor was given the power to veto the action of any municipal board. In the last case cited, the mayor was given the power to veto any ordinance, order or resolution of the council. There is no language in the act under consideration which would justify us in restricting its operation to legislative acts. To hold that it covers all acts involving the exercise of any discretion of the board will lead to no absurd results. To so hold would say in effect to the board: If you have the power of removal, it must be exercised by a two-thirds vote, if the resolution adopted by a majority vote is vetoed. This would

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furnish a reasonable check in such cases on hasty action, and at the same time would not deprive the board from exercising the power. We are therefore of the opinion that the resolution of the board, which removed the president and substituted another in his stead was of no force after the veto was filed.

It is contrary to the practice of this court to determine the right to an office in a mandamus proceeding, but by reason of the pressing nature of the matters now before the board, and the further fact that the record fairly shows that the relator is both president *de jure* and *de facto*, we make an exception to the rule. *Lawrence* v. *Hanley*, 84 Mich. 399 (47 N. W. 753).

If there appears to be any necessity for the issuance of the writ after claimant Coles is advised of the action of this court, the writ will issue as prayed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, MOORE, and STEERE, JJ., concurred.

RIFFEL v. UNION TRUCK CO., LIMITED.

1. EVIDENCE—EXPERT AND OPINION TESTIMONY—NEGLIGENCE.
   Having shown all the facts and surrounding circumstances, the plaintiff in a personal injury case was not entitled to have a witness state his opinion as to what caused the wheel of the truck that plaintiff was driving, when his injury occurred, to come off, permitting one side of the vehicle to drop to the pavement.

2. MASTER AND SERVANT—ASSUMPTION OF RISK—NEGLIGENCE.
   In an action for personal injuries, the plaintiff, a teamster,

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who admitted that he was charged with the duty of inspecting the truck which he drove and with oiling the wheel, assumed any risk of the nut or burr on the axle of the front wheel coming off, a result which was not shown to have occurred because of the flattening of the front axle by use and wear, as claimed by him, although such condition necessitated more frequent oiling.

Error to Wayne; Van Zile, J. Submitted April 27, 1914. (Docket No. 143.) Decided June 1, 1914.

Case by Eugene Riffel against the Union Truck Company, Limited, for personal injuries. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

William Van Dyke and *Andrew F. Burleigh, Jr.*, (*Willis G. Clarke*, of counsel), for appellant.

Brennan, Donnelly & Van De Mark, for appellee.

Plaintiff sued to recover damages for an injury received through the alleged negligence of defendant. A teamster of some 20 years' experience, he had worked for defendant as a driver upon one of their trucks upon this occasion for about one year and upon a former occasion for about five years. The record discloses that on a Friday morning plaintiff was instructed to take out truck No. 34, which he had not theretofore driven. He used this truck all day Friday and a part of Saturday in carrying machinery to the Stroh Brewery Company. The last load being delivered at the brewery, the plaintiff was instructed by Mr. Newman, defendant's foreman, to go to the Lake Shore depot and there get and deliver a load of paper. Plaintiff obeyed his instructions and loaded his wagon with about 9,000 pounds of paper and started to deliver it. At the corner of Bates and Woodbridge streets, as he was turning west from the street car track, the left front wheel of the truck came

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entirely off, permitting the axle to fall upon the ground. This tilted the platform of the truck to such an angle that plaintiff was thrown forward and some of the paper was thrown upon him. He was cut somewhat about the head and sustained a fracture of several ribs and was otherwise injured. Plaintiff avers in his declaration that defendant—

"Negligently and carelessly furnished the said plaintiff with an unsafe truck, and one which the said defendant knew to be unsafe, or should have known in the exercise of that degree of care which the said defendant owed to the said plaintiff in the premises, in that the wheels and axles and the parts around and about the said wheels and axles were unsound and in improper condition, and were not properly maintained and cared for, and which particularly were in dangerous condition by reason of the carelessness, negligence, and neglect of the said defendant, either in the not keeping them in proper repair, or in not properly oiling and greasing them, or in not properly inspecting them."

The following facts may be said to be established by the record: The truck in question had what is known in the business as a flat axle; that is, through use the under part of the axle, where it goes through the boxing in the hub, had become somewhat worn. This condition is one in the process of making from the first day the truck is run. There is no evidence in the record that such a condition tends to render it unsafe, but it does require to be more frequently greased than an axle that is new and round. It is further established by the uncontradicted testimony that the nut or burr on the end of the axle came off before the wheel came off. The nut was some two inches larger in diameter than the hole in the hub into which the boxing was set. To have permitted the wheel to come off over the nut, an inch of solid wood all the way around on the inside of the hub would have had to be cut away. It is uncontradicted

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that, though the boxing remained upon the axle after the wheel left it, immediately after the accident the boxing was taken from the axle, replaced in the hub, which was in good condition, and the wheel replaced upon the axle and the load delivered by another driver. It does not appear that the accident occurred by reason of the axle having run dry and heated, although the fact that the boxing remained on the axle might tend to indicate that condition. The man who made the repairs, however, testified that it was not dry. Plaintiff testified in part as follows:

"I drive any wagon they give me. It is all right whether I take wagon No. 1 or 20 or 34. It was part of my work to see that my wagon was oiled and was in good condition to go out—any wagon they give me. * * * When I broke down I had on a load of paper in 700-pound wooden boxes, pretty near four feet high. I had on 13 boxes and stood in front of the load on the front box. I had No. 34, which I had driven the day before.

"*The Court:* How often had you oiled it?

"*A.* I liked to see what it needs, only I didn't get the time.

"*The Court:* You didn't oil it?

"*A.* No.

"*The Court:* Why didn't you?

"*A.* I didn't get any time for it.

"*The Court:* Used it the day before?

"*A.* Yes, sir.

"*The Court:* A truck like that in use ought to be oiled every morning?

"*A.* No.

"*The Court:* Not before three or four days?

"*A.* Three or four days, yes.

"*Q.* When you took this out Friday morning, why didn't you oil it?

"*A.* When I took it out Friday morning?

"*Q.* Friday morning?

"*A.* I asked the foreman, because it was 5 minutes to 7, and the foreman says, 'You take this 34 and haul those boiler sections.'

"*Q.* Yes, sir.

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"*A.* So I say I had better look at this truck before I take it out.

"*Mr. Donnelly:* I renew my objection.

"*Mr. Van Dyke:* It has been brought out on cross-examination.

"*The Court:* I think that is all right.

"*A.* He says, 'Go ahead.' He say, 'Run off some runs and get a run for you.'

"*Q.* How long does it take to grease those trucks?

"*A.* About ten minutes.

"*Q.* To grease each wheel?

"*A.* The whole wagon.

"*Q.* Did you know when you went back to work Saturday morning that you were going to take 34 out?

"*A.* Saturday morning, yes.

"*Q.* Saturday?

"*A.* Yes.

"*Q.* Now, why did you ask for permission to look it over when you got up to Stroh's brewery before you took the paper?

"*Mr. Donnelly:* Same objection to all this testimony and exception.

"*Q.* And, when you asked at Stroh's brewery for a chance to look the truck over, what did he say?

"*A.* 'That is all right; go ahead. That is all right; go ahead. That is all right.'

"*Q.* Then you didn't look it over?

"*A.* I showed him this wheel where the tire come —this tire must be loose. I don't know anything about the other wheel coming off. I can't see nothing on the inside.

"*Q.* Which wheel was that you showed him?

"*A.* Right hind."

Leonard Wall, a witness for plaintiff, on direct examination, testified as follows:

"*Q.* Did you hear Mr. Riffel inquire Saturday morning for a chance—

"*A.* (interrupting) Yes, sir.

"*Q.* What was told him?

"*Mr. Donnelly:* There was no testimony it was Saturday morning.

"*A.* Saturday morning was the day.

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"*Mr. Van Dyke:* Saturday morning when you saw it?

"*A.* Yes, sir.

"*Q.* What was said?

"*A.* He asked the foreman of the Union Truck Company if he could have time to look over the wagon. He said: 'No, go ahead. It is all right.'

"*Q.* What morning was that?

"*A.* Saturday morning.

"*The Court:* He had driven the same truck the day before?

"*A.* He had driven the same truck the day before; yes, sir."

On cross-examination he testified:

"*Mr. Donnelly:* *Q.* Now, it is true, isn't it, that the teamsters are required to report about 6 o'clock?

"*A.* Six o'clock in the morning. They can come earlier if they wish.

"*Q.* Can come earlier if they wish?

"*A.* Yes, sir.

"*Q.* They have to be on the wagon 10 minutes to 7?

"*A.* Yes, that is the orders of the Union Truck Company.

"*Q.* If they don't get there and get their wagons fixed up before 10 minutes to 7 it is their fault, not the company's?

"*A.* If a wagon isn't fit to be taken out, takes out a new wagon. It is supposed to be looked into.

"*Q.* So if they are not there in time to look over the wagon, that is their fault?

"*A.* They do if they are put on a different wagon.

"*Q.* This was a different wagon. It is in the testimony that he used the wagon the day before?

"*A.* He used the wagon the day before, yes. He had orders to use this wagon; it was the same wagon the day before; it was a better wagon to haul paper on.

"*Q.* When did he get the orders?

"*A.* In the morning.

"*Q.* From the foreman?

"*A.* Yes, sir; he had orders to go with that wagon.

"*Q.* If this man took the wagon out the day before and was going to take it out on Saturday, it was up to him to get down early enough Saturday morning

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to get that wagon fixed up before 10 minutes to 7, wasn't it?

"*A.* Why, he couldn't get at the wagon. How was he going to fit it?

"*Q.* Answer my question.

"*A.* It was jammed between wagons; he couldn't get at it.

"*The Court:* Is that his duty, to get down in the morning to get the wagon ready to go out?

"*A.* Yes, sir; if he has his old wagon.

"*The Court:* Does it make any difference what wagon if he had the wagon the day before?

"*A.* He don't know.

"*The Court:* How do you know?

"*A.* No teamster knows what wagon he is to take until the next morning.

"*The Court:* No teamster knows what he is to take until the next morning?

"*Q.* If he has his own wagon, that is for him to get ready?

"*A.* How can he get his wagon ready if he is busy all the morning moving—

"*Mr. Donnelly:* I move, the court please, that that be stricken out.

"*Q.* You remember that this wagon was used right steadily after that, was it not?

"*A.* It was used steadily after that, yes, sir, for a while. * * *

"*Q.* I understand you to say the men do not know for sure what work they are going to do when they go down to the barn in the morning?

"*A.* He don't exactly know what wagon he is going to hook onto exactly.

"*Q.* The teamsters do not know for sure?

"*A.* No, sir.

"*Q.* So when you get there in the morning the foreman says which wagon you are to use?

"*A.* Yes.

"*Q.* And it is your duty to see that your wagon is in good condition to go out?

"*A.* Yes, if you have time.

"*Q.* You say on Saturday morning this man could not get at this wagon?

"*A.* No, sir; he couldn't.

"*Q.* No room?

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"*A.* No, sir.

"*Q.* Why not?

"*A.* Not until he hooked up and pulled it in the yard past the other trucks could he get at it.

"*Q.* Did he have to be told to take it out in the yard to grease it?

"*A.* No, sir.

"*Q.* Can you take that in the yard, jack it up, and grease it?

"*A.* No, sir.

"*Q.* Why not?

"*A.* Because there was probably some wagons you can't use for a truck.

"*Q.* These wagons are not packed in so close?

"*A.* They are packed in so close that you cannot get off and out of the shed that they are in. The company want to get all the rigs in. * * *

"*Q.* Did you say, 'I heard Mr. Herzog tell all drivers to look after the wagons before going out, and heard him so instruct Riffel?'

"*A.* Yes, sir; provided I have got time to do it. * * * It is a teamster's duty, when he goes down in the morning, to oil and take care of his wagon. That is what Mr. Herzog told our teamsters."

A verdict having been directed in favor of defendant, plaintiff reviews his case in this court by writ of error.

BROOKE, J. *(after stating the facts).* There are but three assignments of error:

"(1) The court erred in excluding the following question: 'What was that accident the result of, in your opinion?' propounded to the witness Leonard Wall by Mr. Van Dyke, attorney for plaintiff.

"(2) The court erred in stating in the charge to the jury that 'there is no proof of negligence.'

"(3) The court erred in directing a verdict for the defendant."

We are of opinion that the answer to this question was properly excluded. All the facts surrounding the accident had been detailed to the jury. It was for the jury to draw such legitimate inferences from those

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facts as were warranted. It was not a case in which expert testimony was admissible. *Lemon* v. *Railway Co.*, 59 Mich. 618 (26 N. W. 791); *Jackson* v. *Railway Co.*, 161 Mich. 163 (125 N. W. 763).

The next two assignments of error may be treated together. They raise the controlling question in the case. In our opinion the verdict was properly directed for the following reasons: The only defect shown to exist in the truck at the time of the accident was that the axle on its underside was worn somewhat flat. It is uncontradicted that this flatness did not render the truck unsafe but that its existence necessitated a more frequent oiling than otherwise. The record clearly shows that the duty of oiling rested upon the plaintiff himself. It is not even shown that the accident occurred by reason of there being insufficient oiling. From all the testimony, the conclusion is inevitable that the accident and resulting injury was caused by the coming off of the nut or burr which holds the wheel upon the axle. This is an accident which, in turning and backing of wagons, we should suppose to be of no infrequent occurrence. It was such an accident as a casual inspection by the plaintiff would have averted, and, according to the testimony in the record, the duty of inspection rested upon plaintiff himself. Indeed, he himself says, "Any man with a new tool ought to look the tool over before he takes it out."

A glance at the alleged defective axle at the depot where plaintiff obtained his last load would undoubtedly have disclosed the condition of the nut. At the time he started from the depot, it must have been very nearly off, as the evidence discloses the fact that in going forward it was so threaded as to become tighter instead of looser through the friction between it and the end of the hub. We think the plaintiff, under the circumstances of this case, must be held to have as-

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sumed the risk. *Prentiss* v. *Manufacturing Co.*, 63 Mich. 478 (30 N. W. 109); *Kean* v. *Rolling Mills*, 66 Mich. 277 (33 N. W. 395, 11 Am. St. Rep. 492); *Wheeler* v. *Berry*, 95 Mich. 250 (54 N. W. 876); *Breig* v. *Railway Co.*, 98 Mich. 222 (57 N. W. 118); *Gavigan* v. *Railway Co.*, 110 Mich. 71 (67 N. W. 1097); *Welch* v. *Brainard*, 108 Mich. 38 (65 N. W. 667); *Soderstrom* v. *Lumber Co.*, 114 Mich. 83 (72 N. W. 13); *Hayball* v. *Railway Co.*, 114 Mich. 135 (72 N. W. 145); *Mackey* v. *Furnace Co.*, 119 Mich. 552 (78 N. W. 783); *Goga* v. *Foundry Co.*, 142 Mich. 340 (105 N. W. 859).

In this connection it should be noted that the defect to which plaintiff called the attention of defendant's superintendent at the brewery company was not in any wise connected with the accident or injury; it consisting in a tendency of the tire on the rear right wheel to come off.

The judgment is affirmed.

McALVAY, C. J., and KUHN, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred.

PEASE *v.* JENNINGS.

1. EVIDENCE — PRIVILEGED COMMUNICATIONS — STATUTORY STATEMENTS AS TO ASSESSABLE PROPERTY.

   Under the provisions of 1 Comp. Laws, § 3846 (1 How. Stat. [2d Ed.] § 1791), making the sworn statement of a taxpayer received by supervisor or assessor, relative to assessable property privileged, and forbidding the use

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thereof for any other purpose, it was not erroneous on the trial of an action for converting assets of an estate to receive evidence of statements made orally by decedent to the supervisor as to his personal property subject to assessment; no written statement having been made by the taxpayer.

2. WITNESSES—MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEDENT—EXECUTORS AND ADMINISTRATORS.

The testimony of children of a deceased son who, under the will, took their father's part of the property of the estate bequeathed, were not opposite parties whose testimony was excluded by 3 Comp. Laws, § 10212 (5 How. Stat. [2d Ed.] § 12856), relating to matters equally within the knowledge of decedent.

3. EVIDENCE—HEARSAY—STATEMENTS OF DECEDENT.

On the issue whether defendant received certificates of deposit of decedent as a gift, statements of the testator showing a hostile feeling toward defendant, were not improperly admitted to show the relations between them and a state of feeling inconsistent with the claimed gift.

Error to Hillsdale; Chester, J. Submitted October 7, 1913. (Docket No. 5.) Decided March 27, 1914. Rehearing denied December 19, 1914.

Assumpsit by Albert A. Pease, as administrator of the estate of Charles Jennings, deceased, against Abner Jennings for the conversion of certain certificates of deposit. Judgment for plaintiff, and defendant brings error. Affirmed.

A. L. Guernsey and *Fellows & Chandler*, for appellant.

Frankhauser & Cornell, for appellee.

MOORE, J. The plaintiff sued the defendant for the conversion of two certificates of deposit, one for the sum of $1,000 and one for the sum of $50. The case was tried before a jury. From a judgment in favor of the plaintiff, the case is brought here by writ of error.

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The family of Charles Jennings, Sr., consisted of himself and wife, his daughter Ella, and two sons Charles, Jr., and Abner. In 1875 Abner bought a farm of 40 acres near his father. The father and two sons worked both farms, and from the proceeds the 40 acres was paid for; the final payment being made about the year 1882. From then on the defendant worked his farm. Charles, Sr., and Charles, Jr., worked the home farm, which was the home of both of them. In 1888 Charles, Sr., made a will giving to Ella $600, Abner $100, and to Charles, Jr., his personal property and the home farm, subject to the life use of the widow, Rhoda Jennings. Between the time of making the will in 1888 and his death, Charles, Sr., accumulated upwards of $1,000 which he put in the bank, receiving therefor certificates of deposit payable to Charles Jennings, Sr. Charles Jennings, Jr., died in February, 1910, leaving a widow, Carrie Jennings, and four daughters.

In the spring of 1910, but after the death of Charles, Jr., Charles, Sr., went alone, using the horse and buggy of Abner, to the residence of John Mercer, and had him draw a will giving the west 18 acres of the home farm to Abner. He executed this will and left it with Mr. Mercer. On the 7th of June following he wrote Mr. Mercer and requested a return of both wills. Later the will of 1888 was delivered for safe-keeping to a Mr. Whitaker. Charles, Sr., died in April, 1911. The will of 1888 has been probated. After the death of Charles, Sr., the defendant presented to the bank issuing them the certificates of deposit in controversy here, and claiming to be the owner of them, had new certificates made, first to himself and wife, and later to himself alone. As before stated, this suit was brought for their conversion.

The first group of assignments of error relate to the admission of testimony. It is said the court erred

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in allowing Supervisor North to testify as to what defendant told him in the spring of 1911 about his personal property. The witness stated he was a supervisor; that he did not ask Mr. Jennings to fill out and sign a blank statement; that he did not require him to, but made it out himself.

"*Q.* When was it that you were there at his house to take this assessment?

"*A.* Now, I can't tell the exact day, but it was in the first of May, from the 4th to the 8th, anyway.

"*Q.* Now, I ask you to tell what conversation and talk you had with him there, what questions you asked him, and what were his answers, as near as you can remember, as to his owning any personal property?

"*Mr. Fellows:* That we object to because it is privileged.

"*The Court:* Well, you may take the answer, and I will control it later.

"*Mr. Fellows:* Exception.

"*A.* Well, I asked him the usual question. Now, on the farms in the townships, we ask them in regard to their horses and cattle, and such things as is around on the farm, and then it's on the statement, 'Have you any bank stocks, mortgages, notes, credits?' and so on. I read that over to the person I am assessing, and I did that to him. He replied to these questions that he had nothing only the personal property on the farm, the horses and cows. He told me about the team and the cows, and I assessed them at $300; $200 of this was exempt, and I put him on the roll in personal at $100. All I assessed was the stock and stuff on the farm, and he gave in no money or credits.

"*Mr. Fellows:* Your assessment is of the 1st of April; that is what property he had the 1st of April?

"*A.* Yes."

It is insisted this is error, citing section 3846, 1 Comp. Laws (1 How. Stat. [2d Ed.] § 1791), and *Williams* v. *Brown*, 137 Mich. 569 (100 N. W. 786). Section 3842 requires:

"Every owner of property liable to taxation * * * shall make out and deliver to the supervisor or

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assessor on demand, a sworn statement of all the property owned or held by him."

Section 3846 provides what shall be done with "all the statements herein required to be made and received by the supervisor or assessor," and has this provision:

"But no such statement shall be used for any other purpose except the making of an assessment for taxes as herein provided, or for enforcing the provisions of this act."

The case of *Williams* v. *Brown, supra,* construed that provision. In that case the tax statement required by law was, in fact, made by the taxpayer. The taxpayer was a witness, the tax statement was put in his hands, and he was cross-examined about it. In the instant case no such statement was made by the taxpayer. The witness was not the taxpayer, and we think the cases are distinguishable, and that the provision of the statute quoted does not apply.

The next group of assignments of error relates to the admission of testimony. We quote from the brief:

"Under the will of the decedent, his farm and personal property were given to his son, Charles, Jr. (the father of witnesses Lulu Hudnut, Lena Giddings, and Lila Jennings, and the husband of the witness Carrie Jennings), and to his heirs forever. It was urged by the plaintiff in the court below that, under the statute designed to prevent the lapsing of legacies (section 9288, 3 Comp. Laws), this property went to the issue of Charles, Jr. This, however, only becomes important in considering the testimony of Carrie Jennings, as it is conceded and insisted by the plaintiff that the children of Charles, Jr., take the property which is involved in this case, provided there is a recovery here. * * * If the plaintiff is correct, and this money is recovered, it will be paid into the hands of plaintiff as administrator, and will go to the four daughters of Charles under this will. Such being the case, we * * * urge upon this court

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that the case of *Peirson* v. *McNeal*, 137 Mich. 158 (100 N. W. 458), is upon all fours with the case at bar."

Counsel also cite section 10212, 3 Comp. Laws. *Ripley* v. *Seligman*, 88 Mich. 177 (50 N. W. 143); *O'Neil* v. *Greenwood*, 106 Mich. 572 (64 N. W. 511); and *Shepard* v. *Shepard*, 164 Mich. 183 (129 N. W. 201).

It was not insisted very strongly in the oral argument, nor is it in the brief, that Carrie Jennings, the widow of Charles, Jr., is incompetent, and we will concern ourselves only with the claim that the testimony of the children of Charles, Jr., was incompetent.

Section 10212, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 12856), reads as follows:

"When a suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, the opposite party, if examined as a witness on his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of such deceased person. * * * Provided, that whenever the words, 'the opposite party' occur in this section it shall be deemed to include the assignors or assignees of the claim or any part thereof in controversy."

Counsel for appellee contend (we quote sufficiently from the brief to indicate the argument):

"We have always supposed, and do now, that it was the purpose of this statute to protect estates; to keep them from being depleted by those who pretend to have had dealings with deceased which had not been closed up before his death. * * * To state it in other words: We have always understood this to be a statute which was designed to put the living and the dead upon the same legal footing; death having closed the mouth of one, precluding him from giving his version of a controversy, the law benignly and justly closes the mouth of the other, so no advantage can accrue to him by the misfortune of the decease of the

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first. We have always understood that this statute closes the mouth of the one who is endeavoring to get something out of a dead man's estate; to lessen it; to deplete it. We supposed that it applied to one who had a claim against an estate which we were seeking to establish as a debt against the estate, and thereby take from the property of the man who was dead and could not appear to meet his antagonist face to face. * * * The view we take of this situation is that the estate of Charles Jennings, Sr., is one party, and that the defendant here, Abner D. Jennings, is the other party; or it might, without any fear of confusion, be stated that the defendant here is arrayed against the estate and is the 'opposite party' to the estate and to the deceased. * * *

"These heirs whose testimony is claimed to be incompetent, under this statute, are giving evidence in favor of the estate, and are not 'opposite parties' to the estate. Their testimony is not incompetent as to matters equally within the knowledge of the deceased; for they are not seeking to deplete the estate, take something from it, to lessen it, but their testimony tends to preserve it, and keep it from being depleted. The incidental fact, if it be a fact, that, if the plaintiff is successful here, they may or may not benefit from the judgment does not make them 'opposite parties' within the meaning of the statute."

We think it is within the principles stated in *Pendill* v. *Neuberger,* 64 Mich. 220 (31 N. W. 177); *Hillman* v. *Schwenck,* 68 Mich. 293 (36 N. W. 77); *Latourette* v. *McKeon,* 104 Mich. 156 (62 N. W. 153); and *Tabor* v. *Tabor,* 136 Mich. 255 (99 N. W. 4); and that the court did not err in its ruling.

The next assignment of error relates to the testimony of D. H. Carney who said (we quote from the brief):

"He [decedent] seemed to be rather bitter towards Abner in that respect. To use his conversation, he says: 'We sent Ab $75 when he was West, and,' he says, 'by God, he has never paid it back, and I haven't forgot it.' He says 'He has got all he will ever get'—is the conversation that he used."

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"This testimony was in the absence of the defendant, and was as to him pure hearsay. It is self-serving in character, and inadmissible. * * *" Counsel citing *Van Fleet* v. *Van Fleet*, 50 Mich. 1 (14 N. W. 671), and several other cases.

In allowing this testimony to come in, the court limited its use to showing the relations of the parties. There are many authorities sustaining the view presented by appellant, but it must be remembered that he is claiming these certificates were given to him. It is the common experience that gifts are ordinarily made only to those for whom the donor has a greater or less regard.

In *Whitney* v. *Wheeler*, 116 Mass. 490, it is said:

"Gifts *mortis causa*, like testamentary gifts, express the state of mind and disposition of the donor towards the donee, and his purpose in regard to the bestowal of his estate. When there is any ground for doubt as to the intent with which a delivery of property was made, or whether in fact its possession was obtained by delivery as a voluntary gift or in some other mode, evidence tending to show a continuous and apparently fixed state of mind and purpose, inconsistent with such alleged gift, existing previously thereto, may have a legitimate bearing upon the case to affect the inferences to be drawn from the facts and circumstances attending the transaction."

In *Whitwell* v. *Winslow*, 132 Mass. 307, it is said:

"On the issue whether the gift of a promissory note was made, statements of the alleged donor, who died before the trial of an action on the note, at different times before and after the alleged gift and inconsistent therewith, are admissible to contradict the testimony of the donee, although not made in the donee's presence."

In Thornton on Gifts, § 222, it is said:

"So prior declarations of the donor in his favor are admissible if they tend to show a continuous and apparently fixed state of mind and purpose in him, inconsistent with the alleged gift to contradict the testi-

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mony of the donee." Citing *Sherman* v. *Sherman*, 75 Iowa, 136 (39 N. W. 232), which case supports the text.

We think the situation disclosed by the record distinguishes the instant case from those cited by appellant. This brings us to the question of whether there should have been a directed verdict.

The judge charged, in part, as follows:

"The sole question for you to determine from all the evidence in this case is whether or not these certificates were the property of Charles Jennings, Sr., at the time of his death, or whether they were the property of Abner Jennings at the time Charles Jennings, Sr., died.

"And in this case, gentlemen, you are not to determine the question of whether Charles Jennings, Sr., was mentally competent or not, or the question of undue influence; for, under the evidence in this case, you are instructed that the evidence does not show mental incompetency or undue influence.

"Now, regarding the possession of these certificates by the defendant, if you find from the evidence that these certificates were indorsed by Charles Jennings, Sr., then the possession of these certificates by Abner Jennings is *prima facie* evidence of title in him (Abner), and creates the presumption that they were delivered to him, and that his possession is lawful; delivered to him in the lifetime of Charles Jennings, Sr. You are, however, to determine the question of whether or not his possession is lawful from all the evidence in the case, and find whether or not this presumption and this *prima facie* evidence is met and overcome by the testimony in the case bearing on the question of whether or not these certificates were given by Charles Jennings, Sr., to the defendant before the death of Charles Jennings, Sr., on April 18, 1911.

"The burden of proof, gentlemen, is upon the plaintiff in this case; that is, the burden of proving that these certificates were the property of Charles Jennings, Sr., at the time of his death is upon the plaintiff. It is his duty to prove this fact by a preponderance of the testimony; that is, there must be more evidence in favor of this claim that he asserts than

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there is against it. This does not necessarily mean numbers of witnesses, but it means that testimony which carries conviction to your judgment."

In view of the fact that decedent left a will giving to Charles, Jr., his personal property, the testimony of the supervisor which we have already quoted, what occurred on the visit of the judge of probate in the presence of the defendant, we do not think the trial judge would have been justified in directing a verdict.

The judgment is affirmed.

MCALVAY, C. J., and BROOKE, KUHN, STONE, OSTRANDER, BIRD, and STEERE, JJ., concurred.

T. W. SNOOK & SON v. MT. CLEMENS SUGAR CO.

1. SALES—ACCEPTANCE AND RECEIPT—DELIVERY—INSPECTION.
Where plaintiff copartnership claimed that it offered to deliver a lot of barrels which had been ordered by defendant, and received instructions from defendant to store them, and that after having done so and some time later, defendant's general manager looked over the barrels and indicated his approval or acceptance, an inadvertence of the court in charging the jury and assuming that he accepted the barrels before they were stored was not so prejudicial and erroneous as to require plaintiff's judgment to be reversed.

2. SAME—WAIVER OF INSPECTION—CONTRACTS.
Evidence that the general manager was able to select good barrels when he saw them, that he saw them at plaintiff's factory and made no objection, that they were sufficient to comply with the order and that a letter was sent to and received by plaintiffs advising them when defendant

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would be ready to receive the merchandise ordered, raised an issue of fact as to defendant's waiver of the right to inspect, the testimony tending to show a long delay in completing the contract on defendant's part.

Error to Macomb; Tucker, J. Submitted October 10, 1913. (Docket No. 18.) Decided April 7, 1914. Rehearing denied December 19, 1914.

Assumpsit by Thomas W. Snook & Son, a copartnership consisting of John R. Snook, the estate of Thomas W. Snook and others, against the Mt. Clemens Sugar Company for breach of a contract of sale. Judgment for plaintiffs and defendant brings error. Affirmed.

Thomas A. E. Weadock, for appellant.

Martin Crocker, for appellees.

MCALVAY, C. J. This is an action of assumpsit brought by plaintiffs against defendant for the price and value of certain sugar barrels manufactured by plaintiffs for defendant, wherein plaintiffs recovered judgment.

Plaintiffs were engaged in manufacturing barrels at Mt. Clemens, and in 1905 defendant company, of the same place, requiring a large number of sugar barrels for the campaign of 1905-1906, asked plaintiffs for quotations on barrels, and by letters which passed between the parties a contract was entered into, as follows:

"Office of T. W. Snook & Son. Manufacturers of Staves and Heading.
"MT. CLEMENS, MICH., June 24, 1905.
"MT. CLEMENS SUGAR CO.,
"Mt. Clemens, Mich.
"*Gentlemen:*

"Complying with your request for quotations on barrels, will say we will agree to furnish you during the coming campaign with 20,000 sugar barrels delivered at your factory at 44½c each. These barrels

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shall be standard sugar barrels made from thoroughly dry No. 1 30" elm staves, No. 1 19⅛" basswood heading and hooped with four wooden and two steel hoops.

"Yours truly,

"T. W. SNOOK & SON."

"Agricultural Department Mt. Clemens Sugar Company.

"MT. CLEMENS, MICH., July 17, 1905.

"MESSRS. T. W. SNOOK & SON,

"Mt. Clemens, Mich.

"*Gentlemen:*

"Replying to your favor of June 24th quoting price of 44½c each on standard sugar barrels delivered at our factory during the coming campaign, barrels to be made from thoroughly kiln dried No. 1, thirty inch elm staves and No. 1, 19⅛ inch basswood heading, hooped with four wooden and two steel hoops, barrels to be first class and acceptable to us. We herewith accept price quoted by you for between 15,000 and 20,000 sugar barrels and should we require more than this number you agree to furnish same at the same price. Confirming talk with our Mr. Weise we will advise you October 1st how many barrels, if any, over 15,000 will be required. Please favor us with an early reply confirming same.

"Yours very truly,

"MT. CLEMENS SUGAR COMPANY,

"GEO. ELSEY, JR., Treasurer."

"MT. CLEMENS, MICH., July 18, 1905.

"MT. CLEMENS SUGAR CO.,

"Mt. Clemens, Mich.

"*Gentlemen:*

"Replying to yours of 17th. We will make and deliver to your factory 15,000 to 20,000 standard sugar barrels in accordance with our letter of June 24, at 44½c each or we will make the number more than 20,000 if you require them, providing you advise us by Oct. 1st, how many more than the 15,000 you will require.

"These barrels shall be made of first class thoroughly dry material and are to be inspected and accepted by you on delivery at your factory. The above price per barrel shall not cover any nails or staples for

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fastening hoops in place nor shall it include head liners. Neither will we furnish hoops nor heads to take the place of those broken by your men, except we charge you the market price for same.

"Yours truly,
"T. W. SNOOK & SON."

Plaintiffs entered upon the manufacture and delivery of these barrels as they were requested or needed during the months of October, November, and December, 1905, having delivered during that time 13,087 standard sugar barrels, which were received, inspected, and accepted at defendant's factory. About January 1, 1906, the balance of the barrels plaintiffs had manufactured under this contract not having been called for, one of the plaintiffs went to defendant's factory and informed the superintendent, Mr. Weise, that the balance of the barrels were ready for delivery, and requested him to take them. The superintendent said that he had no room for them because the warehouse was full of sugar, but he would take them in as soon as he could get room, and requested plaintiffs to store them. Plaintiffs then stored the barrels in the upper part of their cooper shop, as requested.

There is no dispute in the facts in this case as far as stated. Defendant does challenge and dispute the authority of Superintendent Weise to give any instructions to plaintiffs relative to storing the barrels, and the parties do not agree as to what occurred between them when defendant's general manager, Elsey, went to plaintiffs' factory to examine the barrels in question.

The manufacture of beet sugar requires the operation of a factory less than one-third of the year, which season is called a campaign. It is begun in the autumn after the beet crop is harvested and freighted to the factory, and continues until December or January following.

On September 8th, before the campaign of 1906

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began, plaintiffs wrote to defendant the following letter:

"MT. CLEMENS, MICH., Sept. 8, 1906.
"MT. CLEMENS SUGAR CO.,
"Mt. Clemens, Mich.
"*Gentlemen:*
"How soon will you receive the barrels made for you last season?
"Yours truly,
"T. W. SNOOK & SON."

Defendant answered as follows:

"MT. CLEMENS, MICH., Sept. 10th, 1906.
"MESSRS. T. W. SNOOK & SON,
"Mt. Clemens, Mich.
"*Gentlemen:*
"Replying to your favor of the 8th instant, inquiring how soon we will be able to receive the barrels made last season. Captain Davidson is here today; we have had this matter up with the captain and he instructs us to write you that we will be ready to commence receiving the barrels October 1st, when you may deliver 1,000, and the balance, about 900 more, a little later. It is understood, of course, the price is to be the same as last year, 44½c delivered.
"Yours very truly,
"MT. CLEMENS SUGAR COMPANY,
"GEO. ELSEY, JR., General Manager."

To which plaintiff replied:

"MT. CLEMENS, MICH., Sept. 11, 1906.
"MT. CLEMENS SUGAR CO.,
"Mt. Clemens, Mich.
"*Gentlemen:*
"Your favor of the 10th is at hand and contents noted. We stand ready at any time to deliver the barrels and have been anxious all along to do so, as you were notified.
"Will deliver them at the contract price, viz.: 44½c but shall, of course, expect you to pay interest, storage, and insurance, while we have been carrying them for you.
"Yours very truly,
"T. W. SNOOK & SON."

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After the letter of September 8th was written by plaintiffs, and before the defendant answered it, defendant's general manager, Elsey, went to plaintiffs' factory where these barrels were stored, examined them, and was satisfied with such examination. Defendant never replied to the last letter from plaintiffs dated September 11, 1906. No portion of the barrels in suit was ever delivered. Some time before suit was commenced plaintiffs requested defendant to take the barrels. Plaintiffs claim they are entitled to the contract price of 1,900 barrels, with interest, and also for storage of the same after January, 1906.

At the close of plaintiffs' case, and at the close of all the testimony, counsel for defendant asked for an instructed verdict, which was denied and exceptions were taken. The case was submitted to the jury, and a verdict was rendered in favor of plaintiffs. Defendant thereupon made a motion for a new trial for the reasons that the court erred in not directing a verdict, in not giving defendant's requests, and because the verdict was contrary to the evidence. This motion was denied. Later a judgment was in due course entered upon the verdict. This court is asked to reverse the judgment upon errors assigned; upon exceptions taken during the course of the trial; upon the denial of the motions referred to; upon the refusal to grant a new trial; the refusal to give defendant's requests; and to certain portions of the charge as given.

Appellant's second and fourteenth assignments of error are combined and presented together, and with them is also considered assignment 13. These are the most important questions presented in the case.

Defendant's second assignment of error is based upon the admission by the court of testimony of one of the plaintiffs relative to statements made by defendant's general manager, Elsey, when, in September, 1906, he came to plaintiffs' barrel factory to examine these barrels, which had been made under the

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contract with defendant and stored at that place since January, 1906, which was claimed by plaintiffs amounted to an acceptance of the barrels and waiver of inspection by defendant.

Appellant, in discussing these two assignments of error, combines with them the portion of the charge of the court which is covered by the thirteenth assignment of error as follows:

"Now, gentlemen of the jury, if you are satisfied by a fair preponderance of the evidence that these 1,913 barrels were ready for delivery by the plaintiffs in December, 1905, or January, 1906, that they were such barrels as plaintiffs were required by their contract to manufacture and furnish for the defendant, that they were looked over by a representative of the defendant authorized to represent the defendant, and that the defendant company then and there agreed to take the barrels and requested the plaintiffs to keep the barrels for the defendant until the following season opened up, then if, as I say, you find these things by a fair preponderance of the evidence, then the barrels on hand at that time (December, 1905) became the barrels of the defendant company, and should have been paid for by them; and, under these circumstances, if these barrels were kept by the plaintiffs in their storeroom at the request of defendant, then the defendant would be liable to the plaintiffs for a reasonable sum for the storage of the barrels from the time that request was made until such time as they desired their delivery, and unless you are satisfied by a fair preponderance of the evidence that the defendant company by its duly authorized agent looked over the barrels and agreed to take them, and requested the plaintiffs to keep the barrels for them, your verdict must be for the defendant."

The record shows that after the court had given this portion of the charge included in the thirteenth assignment of error, counsel for defendant, at the close of the charge, called attention to it, by saying:

"*Mr. Weadock:* I want to call your honor's attention to the fact that you spoke of a representative of

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the company looking over the barrels, and it would seem that that would take the place of inspection. That was Mr. Elsey, and he looked at the barrels and made the remark that they seemed to have kept well, and that was in no sense an inspection, and could not be considered an inspection as a matter of law."

In reply the court gave the portion of the charge covered by the fourteenth assignment of error, as follows:

"*The Court:* It is my view of the law that while the contract gave the parties the right of inspection at the factory, as I understand it, and required delivery at the factory, these matters are matters that could be waived, and unless you find they were so waived in the manner I have suggested, the defendant [will] be entitled to your verdict."

Counsel for defendant at once, in the presence of the jury, excepted orally to certain portions of the charge, and, to the portion last above quoted, said:

"Defendant * * * excepts to the charge with reference to the barrels having been looked over or accepted by a representative of the company at the place where they were."

It is the contention of appellant that the court confused the testimony of witnesses Snook, Weise, and Elsey in his charge, thereby incorrectly presenting the evidence to the jury. In the first paragraph of that portion of the charge above quoted, under the thirteenth assignment of error, it will be noticed that the court said to the jury:

"If you are satisfied * * * that they were such barrels as plaintiffs were required by their contract to manufacture and furnish for the defendant, that they were looked over by a representative of the defendant authorized to represent the defendant, and that the defendant company then and there agreed to take the barrels, and requested the plaintiffs to keep the barrels for the defendant until the following season opened up, then if, as I say, you find these things

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by a fair preponderance of the evidence, then the barrels on hand at that time [December, 1905] became the barrels of the defendant company. * * *"

The testimony in the case upon which this portion of the charge is based was given by plaintiff Snook, who testified that Superintendent Weise, about January 1, 1906, when the barrels were ready for delivery and were offered to him at the sugar factory by witness, told him there was no room for them, and to store them, which plaintiffs did. The superintendent's testimony upon the matter, which was introduced, corroborated Snook. Eight months later, between September 8 and 10, 1906, it is undisputed that General Manager Elsey examined these barrels in plaintiffs' barrel factory, and at that time the statements were made by him which were urged by plaintiffs on the trial as an examination and acceptance of the barrels. It is evident that the court inadvertently confused the order of events, for there is no claim that the superintendent looked over, saw, or examined the barrels at the time he told plaintiffs to store them, nor is there any claim that the manager, Elsey, saw these barrels before September, 1906. There can be no question but that the record shows that the balance of the barrels were offered at the factory to the superintendent, who could not receive them for want of space, and they were stored by plaintiffs at his request, and that General Manager Elsey, from his testimony, had knowledge of that fact, or that the record also shows that the general manager knew that these barrels had been made under the contract, and in 1906, after receiving plaintiffs' letter of September 8th, *supra,* demanding to know when defendant would receive these barrels, went to plaintiffs' factory for the purpose of discovering whether these barrels were satisfactory.

Counsel for defendant now contends that this inadvertence on the part of the court in his charge was

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misleading to the jury and prejudicial. From the statement of counsel to the court at the time relative to this portion of the charge, the court's attention was not called to this proposition, but directed only to the matter of the acceptance of the barrels without inspection. This was answered by the court in the words of the charge last above given, which was immediately followed by an exception taken by counsel "to the charge with reference to the barrels having been looked over or accepted by a representative of the company at the place where they were." All of the testimony relative to ordering the barrels stored by the superintendent, and the visit later in the year of the general manager to ascertain the condition of the barrels in storage, is so clear and brief that in our opinion the portion of the charge of the court in relation thereto which defendant criticises did not confuse the jury and was not prejudicial to the defendant.

It remains to be considered whether the record shows there was evidence in the case upon the question of the acceptance by defendant's general manager of the barrels at plaintiffs' factory, and a waiver of the inspection provided for in the contract. From what has already been said relative to this matter, from the fact that the general manager testified that he knew a good barrel when he saw it, from the testimony of Mr. Snook as to what occurred at that interview, and testimony of expert witnesses as to the condition of the barrels, and the fact that General Manager Elsey immediately answered plaintiffs' letter of September 8th by a letter of September 10th, saying defendant would be ready for the delivery of 1,000 barrels October 1st, and the balance later at the contract price, our conclusion is that the question was one of fact, and not of law, which was submitted by the court to the jury under proper instructions.

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The remaining contentions of defendant relied upon do not require consideration. We find no prejudicial error in the case.

The judgment of the circuit court stands affirmed.

BROOKE, STONE, OSTRANDER, BIRD, MOORE, and STEERE, JJ., concurred. KUHN, J., did not sit.

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INDEX.

ABANDONMENT—See EJECTMENT (2).

ABATEMENT AND REVIVAL.

It is not erroneous to refuse to revive a suit in the name of a special administrator brought during the lifetime of the deceased to recover certain real property claimed by the deceased, and mandamus will not lie to require the circuit court to enforce such revival under 1 Comp. Laws, § 471 (4 How. Stat. [2d Ed.] § 11989). *McLaulin* v. *Wayne Circuit Judge*, 96.

See EXECUTORS AND ADMINISTRATORS.

ACCEPTANCE—See CONTRACTS (8); SALES (2).

ACCOUNTING—See FRAUDULENT CONVEYANCES; LIMITATION OF ACTIONS (2); WILLS (5).

ACTION—See EXECUTORS AND ADMINISTRATORS; FRAUD (3); PARTIES (1).

ACTIONS, LIMITATION OF—See LIMITATION OF ACTIONS.

ADJOURNMENT—See AMENDMENTS (2).

ADMISSIONS—See CONTRACTS (3); GIFTS (2, 3); MORTGAGES (3).

ADULTERY—See WITNESSES (1).

ADVERSE POSSESSION.

1. Acts of ownership such as to openly and publicly indicate an assumed control or use of the premises, sufficiently sustain the claim of adverse possession; the occupation need not be such as to inform a passing stranger that the person in possession claims title, but if it would advise the owner in case he visits the premises that the person in possession claims to hold adversely the notice is sufficient. *Merritt* v. *Westerman*, 449.

2. Where the holder of certain tax titles put a tenant into possession, claiming to own the premises, and the tenant actually occupied the house and garden mentioned in the lease, and the instrument provided that he should permit no trespass, his occupancy was enough to apprise the original owners that an adverse claim was asserted. *Id.*

See BOUNDARIES; EASEMENTS (2); EJECTMENT (1); EVIDENCE (8).

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AFFIDAVITS—See CRIMINAL LAW (8); JUSTICES OF THE PEACE (2); WITNESSES (2).

AGENCY—See PRINCIPAL AND AGENT.

AMENDMENTS.

1. Where the plaintiff without obtaining leave of the court, filed an amendment to his bill of particulars and thereby added items of a later date, claimed by defendant to be barred by limitation, and where the trial court denied a motion to strike the amendment from the files, based on the objection that the items added were claimed to be new and distinct and because the statute of limitations had run against them, the court acted within its discretion in permitting the amendment to stand. *Hopke* v. *Davidson*, 139.

2. On the trial of a personal injury action in which the plaintiff amended his declaration so as to charge defendant's motorman with subsequent negligence and failure to take necessary precautions to avoid a collision with the car on the rear bumpers of which plaintiff was riding, the court should not have permitted the amendment without granting a continuance which defendant's attorney asked for on the ground of surprise. *Ruscyk* v. *Detroit United Ry.*, 399.

3. The trial court did not commit an abuse of judicial discretion by granting permission to the defendant at the hearing to amend his answer so as to set up the alleged illegality, where a showing was made that satisfied the court. *Berston* v. *Gilbert*, 638.

See ELECTION OF REMEDIES (1); JUDGMENT (2); JUSTICES OF THE PEACE (2, 3).

ANIMALS—See EVIDENCE (3).

ANNUAL REPORT—See CORPORATIONS.

ANNULMENT—See DIVORCE (3).

APPEAL AND ERROR.

1. The instructions of the trial court, in a personal injury case, that the rule of comparative negligence had no application to a servant on a boat which was out of commission and was not in use for purposes of transportation at the time plaintiff was injured, eliminated that question from the case so that defendant appellant need not refer to the claim and ruling in its brief. *Mero* v. *Michigan Central R. Co.*, 1.

2. This court will not pass on questions which were not presented to the trial court. *Moneyweight Scale Co.* v. *David*, 8.

3. In reviewing a decision of the industrial accident board, awarding compensation for the accidental injury and resulting death of an employee, a finding that the injury

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APPEAL AND ERROR—Continued.

did not arise from the intentional and wilful misconduct of the deceased will not be reviewed, if there was evidence to support it. Act No. 10, Extra Session 1912, § 12, pt. 3 (2 How. Stat. [2d Ed.] § 3980). *Rayner* v. *Sligh Furniture Co.*, 168.

4. On error to review a directed verdict, the testimony of the defeated party must be taken as true and considered in the view most favorable to him. *Algate* v. *City of Lansing*, 484.

See INTEREST; JUSTICES OF THE PEACE (1, 2); LIMITATION OF ACTIONS (3); MANDAMUS; SALES (2); TRIAL (2, 3, 7, 8).

APPORTIONMENT—See TAXATION (1).

APPROPRIATE REMEDY—See MANDAMUS.

ARBITER, CITY OFFICIAL AS—See CONTRACTS (14).

ARBITRATION—See CONTRACTS (14).

ARGUMENT OF COUNSEL—See CRIMINAL LAW (6); TRIAL (8).

ARREST.

Although an action of tort may have been instituted by summons instead of a capias, the plaintiff does not thereby lose his right to the writ of *capias ad satisfaciendum* after judgment. *Forsythe* v. *Washtenaw Circuit Judge*, 633.

See WITNESSES (2).

ASSAULT.

Although plaintiff provoked an assault in which he was injured by defendant, the court properly instructed the jury, in an action for the injuries caused by defendant, that the punishment inflicted was unwarrantably severe, submitting to them the question of damages only, upon testimony that the defendant entered plaintiff's yard in a threatening manner, and, when plaintiff struck him, knocked plaintiff down and severely bruised and cut him. *Silvers* v. *Barton*, 59.

See WITNESSES (1).

ASSESSMENT DISTRICTS—See MUNICIPAL CORPORATIONS (1); TAXATION (1).

ASSETS OF INSOLVENT—See RECEIVERS (1).

ASSIGNMENTS.

1. The lien of an automobile repair man for repairs and a tire furnished to the owner of an automobile is assignable and enforceable in favor of the assignee who obtains possession of the machine. 3 Comp. Laws, § 10054 (5 How. Stat. [2d Ed.] § 12704). *Gardner* v. *Le Fevre*, 219.

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ASSIGNMENTS—Continued.

2. While an item for freight paid by the garage owner was not assignable as a part of the account, it could be treated as paid by the proprietor of the automobile out of $75 which had been advanced by such owner on account, and which more than covered the freight. *Id.*

3. Although defendant may not have had a lien for an extra tire furnished for the automobile, he was entitled to a common-law lien on the tire for its value. *Id.* 220.

See FRAUDS, STATUTE OF (4).

ASSUMPSIT—See ELECTION OF REMEDIES; JUDGMENT (2).

ASSUMPTION OF RISK—See MASTER AND SERVANT (2-4, 18, 24).

ATTORNEY AND CLIENT.

1. Where plaintiffs made with an injured party an oral agreement to take his case as attorneys and prosecute the claim for one-third of the proceeds if the client should pay expenses, and, if not, the attorney should have 50 per cent. of the amount to be secured, and where plaintiffs proceeded with the suit and the client paid none of the costs and defendant settled with the client direct after having notice of the contingent contract, there was evidence to sustain a verdict for plaintiffs for half the amount obtained by the compromise. *Lehman* v. *Detroit, etc., R. Co.*, 362.

2. Evidence that plaintiffs, in a suit to recover their share of proceeds secured by a client in compromising a personal injury claim, had notified the defendant railroad and all its attorneys that they had the case on a contingent basis, presented a question of fact for the jury on the issue of notice. *Id.*

3. *Held*, also, that a verdict for plaintiffs was not contrary to the weight of the evidence. *Id.*

See CHAMPERTY AND MAINTENANCE; EVIDENCE (9); TRIAL (5, 6).

AUCTIONS AND AUCTIONEERS—See BROKERS (1, 2).

AUTOMOBILES.

1. Evidence, not in dispute, that the defendant, an automobile manufacturer, sold a car to a purchaser in the regular conduct of its sales business, and, following a custom, permitted the buyer to use its license number in driving through the city, and that defendant furnished for him, at his request, a chauffeur, who was one of the regular employees of the defendant, to drive the car in the city, *held*, not to charge the defendant with liability to a pedestrian injured by the negligent act of the driver of the automobile which had been paid for in cash and had become the property of the buyer, who was also an experienced driver. *Janik* v. *Ford Motor Co.*, 557.

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AUTOMOBILES—Continued.

2. An employee of one person may become the special servant of another with all the mutual rights and obligations of master and servant for the time of, and with respect to, the special service in which he is temporarily engaged. The test is whether the servant becomes subject to the direction of the person to whom he is lent or hired, or remains under the control of his original employer. *Id.*

3. Evidence, in an action for personal injuries, tending to show that the defendant's automobile collided with plaintiff who was riding on a bicycle, that defendant in operating his car turned the corner on the wrong side of the street intersection, and that he was driving at an excessive rate of speed, sustained a judgment for the plaintiff, although the defendant's evidence tended to dispute the claim. *Holden* v. *Hadley*, 568.

See ASSIGNMENTS; NEGLIGENCE (1, 2); STREET RAILWAYS (2).

BAILMENTS—See ASSIGNMENTS (1); CHATTEL MORTGAGES (2).

BALLOT BOXES—See CONSPIRACY (1).

BANKRUPTCY—See RECEIVERS (1).

BANKS AND BANKING—See BILLS AND NOTES (3).

BAY CITY SCHOOL BOARD—See PUBLIC OFFICERS (1).

BIDDER, RESPONSIBILITY OF—See BROKERS (2).

BILL OF LADING—See EVIDENCE (5).

BILL OF PARTICULARS—See AMENDMENTS (1).

BILLS AND NOTES.

1. A purchaser in good faith acquires valid title to negotiable bonds payable to bearer, although they may have been stolen by the prior holder. *City of Adrian* v. *Whitney Central Nat. Bank*, 171.

2. Such holder has the burden of proving that he is a holder in due course, within the meaning of the negotiable instruments law. Act No. 265, Pub. Acts 1905 (2 How. Stat. [2d Ed.] § 2762 *et seq.*). *Id.*

3. Where defendant bank makes a loan to the manager of a hotel on the security of two municipal sewer bonds, payable to bearer, and the bank ascertained before taking the pledge that he was in fact manager of the hotel, but had no notice that his title was bad or the bonds had been stolen by him, it was a bona fide purchaser and acquired the title as against the owner who had intrusted the securities to him for safe keeping while living as a guest at the hotel. *Id.*

BONDS—See BILLS AND NOTES (1); JUSTICES OF THE PEACE (3); PLEADING (2).

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BOUNDARIES.

In an injunction suit involving the boundary lines of complainant's real property, evidence examined, and *held*, to support a decree for complainant and against defendants' claim of adverse possession. *Alcona County Agricultural Society* v. *Colwell*, 15.

See EJECTMENT (1).

BREACH OF CONTRACT—See CONTRACTS (12, 13, 15, 18).

BREACH OF WARRANTY—See SET-OFF AND RECOUPMENT.

BROKERS.

1. Where plaintiff was engaged by defendants to sell a quantity of land at auction for $1,000 and his expenses, and for a stipulated part of all sales in excess of an agreed sum, the trial court correctly held that there could be no recovery for sales not actually made on terms satisfactory to the owners or on terms as offered before the sale. *Sotham* v. *Macomber*, 120.

2. It was also proper to receive evidence that one of the bidders at the sale was not pecuniarily responsible and was unable to comply with the terms publicly offered and was never in a position to buy the land on which he made a bid. *Id.*

3. Where plaintiff, acting as broker for the defendant, secured a buyer for the property who was ready and able to pay the price, and, at the time the transaction should have been concluded, the defendant was in Europe and the buyer, through defendant's agent, obtained possession of the premises, which he occupied for some time, afterwards conveying the property to defendant by quitclaim deed, the plaintiff had performed his commission so as to be entitled to the agreed compensation. *Blakeslee* v. *Peabody*, 408.

4. Under conflicting testimony, the issue whether defendant ratified the sale by negotiating with the purchaser and obtaining a quitclaim deed of the premises during the absence of defendant from the country, was a question of fact, properly left to the jury. *Id.*

5. Evidence tending to show that plaintiff brokers undertook to sell real property of the defendant for a price agreed upon, that they found a purchaser ready and willing to pay the price asked, that defendant declined to make the conveyance because his wife would not sign the deed, defendant disputing the claim of plaintiffs as to the contract, *held*, to present an issue of fact which was properly submitted to a jury. *Evans* v. *Russell*, 534.

See EVIDENCE (4).

BURDEN OF PROOF—See BILLS AND NOTES (2); EVIDENCE (2, 3); MASTER AND SERVANT (17).

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CANALS—See EASEMENTS (1).

CANCELLATION OF INSTRUMENTS.

1. A bill to set aside a deed of real property, on the ground of fraud and duress and of mental incompetency on the part of the grantor, deceased, presents a case for equitable cognizance, notwithstanding that complainants in their bill prayed to have the conveyance canceled as a cloud on their title, or that defendants were in possession. *Lecus* v. *Turns*, 117.

2. Evidence examined, and *held*, that, complainants having failed to establish any fraud on the part of defendants, the bill was properly dismissed. *Id.*

See CONTRACTS (19).

CAPIAS AD RESPONDENDUM—See FRAUD (1); WITNESSES (2).

CAPIAS AD SATISFACIENDUM—See ARREST.

CARELESS USE OF FIREARMS—See CRIMINAL LAW (9).

CARRIERS.

1. Where plaintiff claimed that it ordered refrigerator cars from defendant railroad company in which to ship peaches, having, previously to the order, advised defendant that a large number of cars would be needed to move the crop in that vicinity, that defendant neglected to provide refrigerator cars as they were needed and requested, so that plaintiff had to can the peaches and was compelled to use inferior and soft fruit, evidence tending to support the claims was properly submitted to the jury as a question of fact, under the terms of Act No. 300, Pub. Acts 1909 (3 How. Stat. [2d Ed.] § 6531). *Fremont Canning Co.* v. *Pere Marquette R. Co.*, 283.

2. It was also proper to charge the jury that the dispute was whether the cars were furnished, as requested, and if they were not furnished, whether there was a reasonable excuse; that the goods were perishable, that defendant's duty was not confined to furnishing cars for the village that plaintiff shipped from, that the railroad could not discriminate and must treat all shippers alike, that it was plaintiff's duty to do everything it could to take care of peaches which were left on its hands by reason of defendant's failure to furnish cars, that if it used such peaches in the canning factory and they had deteriorated in value and plaintiff suffered damages accordingly, the verdict should be for that amount, provided the damage resulted from defendant's failure to furnish refrigerator cars, that it was no defense that persons who should have furnished ice for the cars failed or neglected to provide ice, nor was it a sufficient defense that defendant placed more cars at the point of shipment during the season than plaintiff ordered if defendant failed to furnish cars on the dates for which plaintiff ordered them. *Id.* 284.

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CARRIERS—Continued.

3. It was also proper to submit to the jury plaintiff's claim that the cars were delayed in transit to the place of consignment, supported by its testimony and contradicted by evidence offered by the defendant. *Id.*

4. *Held*, that there was evidence supporting a verdict for plaintiff's entire claim and the judgment should not be reversed as excessive. *Id.* 285.

5. While it is the duty of a railroad company to provide safe platforms, free from snow and ice, if reasonable opportunity to remove it occurs, there is no obligation requiring such carriers to keep the platforms of its cars entirely free from snow during bad, stormy weather, or to remove the accumulated snow at every station; and a passenger who was injured in passing from one car to another by slipping on accumulated snow, soon after leaving a main station and before arrival at a point where the work of clearing the cars was usually performed, the weather having been snowy and stormy, could not recover against the carrier. *Meyer* v. *Michigan Central R. Co.*, 516.

See APPEAL AND ERROR (1); DAMAGES (1); EVIDENCE (6); PARTIES; STREET RAILWAYS (4).

CERTIORARI—See APPEAL AND ERROR (3).

CHAMPERTY AND MAINTENANCE.

Although it was champertous at common law to agree to divide the subject matter of litigation between client and attorney, and for the latter to advance the expense of suit, the former rule has been abolished in Michigan by statute. 3 Comp. Laws, §§ 10054, 11254 (5 How. Stat. [2d Ed.] §§ 12704, 14432). *Lehman* v. *Detroit, etc., R. Co.*, 362.

CHARITABLE USES—See TRUSTS; WILLS (1, 2).

CHASTITY—See DIVORCE (3).

CHATTEL MORTGAGES.

1. A creditor, whose claim arose after the giving by his debtor of a chattel mortgage, which was not filed in the office of township clerk, is entitled to assert against such chattels a judgment and execution lien obtained after the mortgage was duly recorded (Act No. 258, Pub. Acts 1905, § 10, 3 How. Stat. [2d Ed.] § 11407) if the conveyance was not accompanied by an actual and continued change of possession of the mortgaged chattels. *O'Neil* v. *Brooks*, 540.

2. Where mortgaged horses were turned over to a creditor of the owner, to be used at an agreed rate and the same applied on the indebtedness, and there was no evidence that the bailee creditor was to take possession and hold them for the mortgagee of the team, no such change of possession in behalf of the mortgagee was shown as to protect his interest against the rights of a subsequent creditor of the mortgagor without notice. *Id.*

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CHECKS—See TROVER AND CONVERSION (1).

CIRCUIT COURTS—See COURTS.

CITIES—See MUNICIPAL CORPORATIONS (5, 8).

CIVIL ACTION—See ASSAULT.

CIVIL PROCESS—See ARREST.

CLAIMS—See ESTATES OF DECEDENTS; MINES AND MINING (4).

COLLEGES AND UNIVERSITIES.

1. The provisions of section 1*a* of Act No. 324, Pub. Acts 1913, providing that no part of the appropriation granted by this act or of any other appropriation for the Michigan agricultural college should be available in case a sum in excess of $35,000 from any or all sources should be expended in any one fiscal year for the maintenance of the mechanical and engineering department, are to be construed as limiting the expenditures for the maintenance of the department specified to $35,000 and to make unavailable for college purposes all of its funds in case the maximum named should be exceeded. *State Board of Agriculture* v. *Auditor General*, 349.

2. While the act might stand without this provision if the clause was intended as merely admonitory, the language is not so construed, but is *held* to have been intended as a controlling limitation. *Id.*

See CONSTITUTIONAL LAW (11).

COMBINATION—See CONSPIRACY (2).

COMITY—See CONFLICT OF LAWS.

COMMISSIONERS IN PARTITION—See PARTITION (1).

COMMISSIONS—See BROKERS (1, 3, 5).

COMMON CARRIERS—See CARRIERS.

COMMON COUNCIL—See MUNICIPAL CORPORATIONS (1, 2).

COMMON-LAW LIEN—See ASSIGNMENTS (3).

COMPARATIVE NEGLIGENCE—See APPEAL AND ERROR (1).

COMPENSATION—See BROKERS (3).

COMPROMISE AND SETTLEMENT—See ATTORNEY AND CLIENT (2).

COMPROMISE VERDICT—See DAMAGES (3).

CONCEALMENT—See INSURANCE (2).

CONCURRING CAUSE—See MASTER AND SERVANT (11).

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CONDITIONAL SALES—See SET-OFF AND RECOUPMENT (2).

CONDITION PRECEDENT—See CONTRACTS (12).

CONDONATION—See DIVORCE (1).

CONDUCT OF COUNSEL—See TRIAL (3, 5, 7, 8).

CONDUCT OF COURT—See CRIMINAL LAW (7); TRIAL (4).

CONFIDENTIAL COMMUNICATIONS—See EVIDENCE (4).

CONFIRMATION OF ASSESSMENT ROLL—See MUNICIPAL CORPORATIONS (2).

CONFLICT OF LAWS.

The exception to the rule of comity between courts of different States whereby citizens of the forum are protected as against residents of another State, *held*, not to be involved. *Rickman* v. *Rickman*, 225.

See CONTRACTS (7); RECEIVERS (1, 5).

CONJECTURE—See MASTER AND SERVANT (19).

CONSIDERATION—See FRAUD (2); FRAUDS, STATUTE OF (3).

CONSPIRACY.

1. A declaration averring that plaintiff, a saloonkeeper, became a candidate for election as a trustee of the village of Grosse Pointe Shores, that the defendants were the village council and were inspectors of election, that defendants did not want a saloonkeeper upon the board and conspired together to deprive him of the election, that they counted the votes dishonestly, and although plaintiff was elected by a plurality of two votes they declared his opponent elected to the office, that one of the defendants pushed a ballot cast for the plaintiff into the box with the point of a pencil and thereby placed a distinguishing mark upon it, that the defendants failed to seal the ballot boxes as required by law and refused to recount them on petition of the defeated candidate because the boxes were not locked and sealed, sufficiently alleged facts constituting a cause of action. *Veriden* v. *McLeod*, 182.

2. A conspiracy is a combination of two or more persons by some concerted action to accomplish a criminal or unlawful purpose, or to accomplish a purpose not unlawful by criminal or illegal means. *Id.*

3. Where the evidence did not establish a joint assent of the minds of two or more defendants to effect the unlawful purpose of keeping plaintiff out of office as village trustee it was insufficient to sustain a verdict. *Id.*

CONSTITUTIONAL LAW.

1. The provisions of article 5, section 30, of the Constitution, which provides that no local act shall be passed by the

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CONSTITUTIONAL LAW—Continued.

legislature if a general act can be made applicable, and that local acts shall be approved by the electors of the district to be affected before they may become law, were intended to abolish the abuses prevalent in the legislature in the enactment of special legislation and to secure to the people of the State the right to control their local affairs within the community affected. *Attorney General, ex rel. Dingeman,* v. *Lacy,* 329.

2. The section of article 7 vesting the judicial power in the Supreme Court, circuit courts, etc., requires the establishment of inferior courts under general laws enacted by the legislature; local legislation being prohibited by necessary implication. *Id.*

3. Since the Constitution was intended to prohibit local or special acts except under the conditions specified therein, its provisions cannot be evaded by classifying counties or divisions according to population for the purpose of establishing inferior courts. *Id.*

4. Act No. 186, Pub. Acts 1913, creating a court of domestic relations in counties having upwards of 250,000 population, is local in its purpose and effect and violates the above-mentioned sections of the Constitution. *Id.*

5. In order to warrant the legislature in so classifying municipalities or other subdivisions of the State, it is necessary to find justification therefor in some substantial difference in conditions arising out of the greater number of inhabitants, and in no case may such a classification be sustained where it is a manifest subterfuge. *Id.* 330.

6. In depriving the probate court of jurisdiction in cases of juvenile delinquency, the statute (section 10) further violates the Constitution, article 7, sec. 13. *Id.*

7. And it is also invalid because the act attempts to deprive the circuit court of Wayne county of a portion of its appellate jurisdiction conferred by section 13, art. 7, Constitution. *Id.*

8. Acts of the judge of the court of domestic relations created in Wayne county pursuant to the invalid legislation are not open to jurisdictional objections, being the acts of a *de facto* officer. *Id.*

9. A franchise granted to a street railway corporation by the city of Detroit, reserving to the city the power of revocation at will, and providing for no definite term, is not void under section 29, art. 8, of the Constitution, whereby franchises for a longer period than 30 years are prohibited, since the grant cannot extend beyond the period limited by the Constitution. *Peck* v. *Detroit United Ry.,* 343.

10. Where the common council of the city of Detroit passed a franchise with a proviso that if the city should engage in the operation of street railways it should purchase the

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CONSTITUTIONAL LAW—Continued.

tracks and equipment of the portion covered by such franchise at a price to be determined by agreement or by arbitration, the proviso did not violate the Constitution by limiting the power of the council to revoke the resolution, and could not be construed as having that effect. *Id.*

11. Under the Constitution, art. 11, §§ 10 and 11, the legislature is required to maintain the agricultural college, and by section 8, the State board of agriculture is given control and supervision of its funds, so that it exceeded the power of the legislature to limit the amount which the board of agriculture might expend to maintain the engineering and mechanical department. Act No. 324, Pub. Acts 1913. *State Board of Agriculture* v. *Auditor General*, 349.

12. The statute being invalid, its provisions for increasing the tax for the benefit of the college to one-sixth of a mill must be declared ineffectual, and it is *held*, that the conditions of section 1*a* were so mutually connected with and dependent on the remainder of the law as to invalidate the entire act. *Id.*

13. The constitutional rule of uniformity of taxation does not apply to assessments for local improvements, which are governed by special rules, and are made upon the assumption that the property assessed is specially and peculiarly benefited by a public improvement. *City of Detroit* v. *Weil*, 593.

14. Since it is the right and duty of the police to search any person who is taken into custody and his room or the place in which he may have been arrested, no constitutional right of a respondent was violated in searching his room and taking possession of two revolvers which were found there; nor was it erroneous, in a murder case, to require him to answer a question whether the weapons belonged to him. *People* v. *Cona*, 641.

See INTOXICATING LIQUORS (3)

CONSTRUCTION OF CONTRACT—See CONTRACTS (1-3, 5, 12).

CONSTRUCTION OF MORTGAGE—See MORTGAGES (1).

CONSTRUCTION OF STATUTES—See COLLEGES AND UNIVERSITIES; CRIMINAL LAW (10); MUNICIPAL CORPORATIONS (6); RECEIVERS (5).

CONTEMPT—See RECEIVERS (3).

CONTINGENT COMPENSATION—See ATTORNEY AND CLIENT (1).

CONTINUANCE—See AMENDMENTS (2).

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CONTRACTS.

1. Under a written agreement of plaintiff to supervise the removal of a beet sugar factory from one location to another, and to rebuild the factory and assist in its operation for a period of months, plaintiff to furnish an engineer to superintend the erection of the machinery and one for the erection of the building and to pay wages, salary, and expenses and furnish architect's plans, etc., with a guarantee that the plant should operate as economically and efficiently as before, in consideration whereof defendant promised to pay $15,600, as stated, in detail, in the agreement, which also provided that both parties should use their best efforts to complete the removal and reconstruction of the factory and to promote its successful operation up to February of the following year, and that plaintiff should assist in the operation of the factory up to that time, services and labor of the plaintiff in securing a site, negotiating for tracks and rates on shipments and purchases, and securing acreage from farmers to grow beets were not included by the terms of the contract. *Hapke* v. *Davidson*, 138.

2. It is a rule of construction of contracts that the court should endeavor to determine the intention of the parties, and should examine and give effect to every word or phrase, so far as practicable. *Id.*

3. But an admission of the plaintiff contained in a letter that he did not intend to compel the defendant to pay for extra services, if defendant, as he had previously promised, would assist him financially, taken with the presumption of fact that services performed should be considered as included by the provisions of the contract, *held*, to require the court to set aside the verdict and judgment as against the weight of evidence. *Id.*

4. Before a contract can be completed there must be an offer and acceptance. *Dudley A. Tyng & Co.* v. *Converse*, 195.

5. Where defendant wrote to plaintiff corporation to buy certain stock at a price mentioned, and later told plaintiff's representative over the telephone to let the offer stand, that defendant would be glad to get the stock at that price any time, although plaintiff's version of the conversation was disputed by the defendant, there was sufficient evidence to sustain a finding that the defendant had given a standing order for the purchase of the stock. *Id.*

6. An offer may be accepted by telephone or telegraph. *Id.*

7. The place of a contract is generally determined by the place at which the acceptance is given: the contract is made where the acceptance is posted. *Id.*

8. An acceptance of an offer made by telephone completes the contract as of the place where the acceptance is communicated. *Id.*

9. Illinois having no statute of frauds, an offer accepted by

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CONTRACTS—Continued.

telephone from Chicago is valid, although the amount of property involved exceeds $50. *Id.* 196.

10. In order to bind the plaintiff, it was not essential that it should have title to the stock which it bound itself to secure. *Id.*

11. Under a written contract to sell all the scrap iron owned by plaintiff at a place specified, defendant was not entitled to claim materials, dynamos and engines which were capable of being repaired and placed in running order. *Northwestern Cooperage & Lumber Co.* v. *Rubinsky*, 413.

12. Failure of defendant to furnish shipping directions at the request of the vendors of certain scrap iron, the required information not appearing in the written contract between the parties, excused the vendor for not shipping the merchandise. *Id.*

13. Evidence in an action against a municipal corporation for breach of a sewer contract that plaintiff was unable to get sufficient brick of the kind specified by the city engineer, who was charged with the duty of inspection, and that plaintiff substituted a kind of brick which was more expensive and conformed to the requirements of the contract, but the engineer rejected the work in which such material was employed and refused to give an estimate such as the contract provided for on work thereafter done in a proper manner by the contractor, *held*, to present a question for the jury whether the defendant had violated the agreement. *Algate* v. *City of Lansing*, 434.

14. A provision in a contract for the construction of a city sewer that all materials should be furnished by the contractor and approved by the city engineer before being used, did not make the decision of the engineer final and conclusive: nor was a further contract proviso that all work should be done in a neat, substantial, and workmanlike manner, "to the satisfaction of the common council, under the direction of the engineer whose orders are to be obeyed in all matters pertaining to workmanship or materials subject to these specifications," sufficient to vest in the city officials authority to finally pass upon work and materials used. *Id.*

15. And whether or not the decision of the engineer was fair and reasonable so as to bind the parties, plaintiff was entitled to have an estimate on work which was not questioned and which he had done after the rejection of the substituted brick: failure to furnish such estimate constituted an actionable breach of a contract that provided that estimates for partial payments should be made upon request of the contractor presented prior to Saturday of any week. *Id.*

16. The contract was not of the class known as satisfaction contracts, in which the taste or judgment of one of the

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CONTRACTS—Continued.

parties is made the sole basis of acceptance or rejection, but if the work which was done by the contractor conformed in a reasonably sufficient manner to the requirements of the contract it was a complete performance and he was entitled to an estimate. *Id.* 485.

17. Under a contract for the manufacture of concrete pipe, of certain dimensions, not fixing a time of delivery or for completion of the work, the question of the time of performance depended on what was reasonable, and, the facts not being in dispute, the question became a question of law for the court. *Reinforced Concrete Pipe Co.* v. *Boyes*, 609.

18. Evidence that the pipe specified by the written contract was ready for delivery in about two months, that over 3,000 feet was manufactured, and that the work progressed continuously from the time when it was commenced, that substantially the only delay arose from the fact that some curved pipe was required, and that the contract between plaintiff and defendant did not specify curved pipe, *held*, to have warranted the court in directing a verdict for the plaintiff, in an action on the contract, and against the claim of the defendant contractor for recoupment for delay. *Id.*

19. A contract for the sale of land that was executed on Sunday is void under 2 Comp. Laws, § 5912 (2 How. Stat. [2d Ed.] § 5261), although dated on the preceding Saturday, and cannot be ratified upon a secular day. *Berston* v. *Gilbert*, 638.

20. Where a land contract was void because the parties executed it on Sunday, the purchaser could not create a new and distinct agreement by taking possession of the premises and building on them, or by making payments under the contract; because the acts relied upon were done under the provisions of the void instrument. *Id.*

See AMENDMENTS (3); ATTORNEY AND CLIENT (1); BROKERS (1, 3); CHAMPERTY AND MAINTENANCE; EVIDENCE (5, 7); FRAUD (2); FRAUDS, STATUTE OF (1); PRINCIPAL AND AGENT (3); SALES; SET-OFF AND RECOUPMENT (2).

CONTRIBUTORY NEGLIGENCE—See AMENDMENTS (2); APPEAL AND ERROR (3); EVIDENCE (2); LANDLORD AND TENANT; NEGLIGENCE (1, 2); STREET RAILWAYS.

CONVEYANCES—See WILLS (8).

CORPORATIONS.

Directors of a corporation which filed no report in the year subsequent to its organization were not liable for debts contracted during the first year of its existence, the corporation not being in default and the liability of directors under Act No. 137, Pub. Acts 1907 (4 How. Stat. [2d Ed.] § 9543), being dependent upon a default in the

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CORPORATIONS—Continued.

filing of the annual report. *Westchester Appliance Co.* v. *Englehardt*, 602.

See SET-OFF AND RECOUPMENT (1).

COSTS—See STATUTES (1).

COUNTIES, LIABILITY OF STATE TO, FOR COSTS OF CRIMINAL PROSECUTION—See STATES.

COURSE OF EMPLOYMENT—See MASTER AND SERVANT (10).

COURTS.

The recorder's court of the city of Detroit has exclusive jurisdiction of the taking of private property for public purposes by eminent domain proceedings, and a petition filed in the circuit court should be dismissed upon defendant's plea to the jurisdiction. *City of Detroit* v. *Weil*, 594.

See CONSTITUTIONAL LAW (1-4, 6-8); RECEIVERS (5).

COVENANTS—See ESTOPPEL.

CRIMINAL LAW.

1. Although the prosecuting attorney should indorse on the information names of witnesses who are material, in a prosecution for obtaining money under false pretenses, it was not erroneous to permit the prosecuting officer, who notified the counsel for respondent on the day after he learned their names that he intended to apply for leave to add to the information names of witnesses who, on the trial, gave testimony relative to matters brought out by other witnesses at the preliminary examination. *People* v. *Segal*, 316.

2. Evidence that the accused owed $300 upon a previous transaction with the complaining witness, who made a second loan of $500 on representations of respondent that he wanted the money to engage in a deal from which he expected to derive large profits, was not improperly admitted on the trial, as bearing on the matter of intent. *Id.*

3. Testimony that the respondent claimed to own three car loads of potatoes, which he did not, in fact, have, tended to support the charge that he obtained the loan by false pretenses. *Id.* 317.

4. The false pretenses must refer to some existing fact, and statements concerning what would occur in the future are not a sufficient basis for the charge. *Id.*

5. Evidence *held* to present a question of fact as to the making of false representations and as to respondent's intent to deceive. *Id.*

6. Where the respondent had denied that he had been convicted of any former offenses, and subsequently admitted that he had been arrested and convicted, the prosecuting

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CRIMINAL LAW—Continued.

attorney was entitled to comment in his argument upon the veracity of the accused and draw inferences from apparent inconsistent statements. *People* v. *Cona*, 641.

7. Nor was it prejudicial to the rights of the respondent for the court, during the argument of the prosecuting attorney, to warn counsel for the accused not to interrupt but to take his exceptions. *Id.*

8. *Held*, also, that a new trial was not improperly denied upon affidavits of the defense wholly or partly met or contradicted by affidavits of the prosecution, relating to newly discovered evidence. *Id.*

9. Under 3 Comp. Laws, § 11510 (5 How. Stat. [2d Ed.] § 14559), providing that "any person who shall discharge without injury to any other person, any firearm, while intentionally, without malice, aimed at or toward any person, shall be guilty of a misdemeanor," etc., acts carelessly done, without design to do mischief, are punishable. *People* v. *Kreidler*, 654.

10. It is sufficient, in a prosecution for violating the statute to show that the accused was making use of a rifle pointed in the direction of a passenger on a car and discharged the weapon in that direction, without striking any one. The word "toward" means in a course or line leading in the direction of. *Id.*

See CONSPIRACY; CONSTITUTIONAL LAW (14); INTOXICATING LIQUORS (1-3); MALICIOUS PROSECUTION (5); STATES; TRIAL (9); WITNESSES (4).

CROSS-EXAMINATION—See EVIDENCE (8, 9); WILLS (7); WITNESSES (4).

CUSTOMS AND USAGES.

1. In an action for negligent injuries to the employee of a sugar factory, who was injured by defendant's train in switching upon the property of plaintiff's employer, his testimony that he had been employed about ten days by the sugar company, that it was customary when defendant did switching in the yard of the factory for the conductor of the train or some other employee to precede the engine on the track to give warning of its approach, not corroborated by plaintiff's other witnesses who had been familiar with the conditions for a longer time than had plaintiff, and who testified that after the original warning no further effort was made to notify the workmen of the approaching train, except that a lookout was stationed on the first car, *held*, insufficient to establish a custom which would be binding on the defendant. *Fogarty* v. *Michigan Central R. Co.*, 422.

2. A custom must be certain, uniform, invariable and notorious, that is, known to all persons of intelligence having to do with the subjects to which it relates. *Id.*

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DAMAGES.

1. Where plaintiff showed that, because of the failure of a common carrier to furnish refrigerator cars for shipping peaches, plaintiff sustained a loss and was obliged to use soft peaches in its canning factory, and that it minimized the damages by saving such fruit as was fit for canning, claiming as a part of its damages the waste resulting from the defective peaches, defendant could not complain of the measure of damages adopted. *Fremont Canning Co.* v. *Pere Marquette R. Co.*, 284.

2. Plaintiff's damages, in an action of trover for converting a second-hand sewing machine, were not limited to the market value, which defendant's agent testified was only $5 or $10, where plaintiff and his wife gave testimony tending to show the cost and present value and that it worked about as well as a new one; the owner being entitled to full compensation for his property. *Barbrick* v. *White Sewing Machine Co.*, 535.

3. Although plaintiff's evidence showed damages amounting to $95.70, and defendant's proofs tended to prove that no cause of action existed, a verdict for $48.50 was rightly allowed to stand, and the court correctly refused to set it aside as a compromise verdict if it did not clearly appear that the jury reached the result by splitting differences. *Crawl* v. *Dancer*, 607.

See CARRIERS (2); PHYSICIANS AND SURGEONS (3); PLEADING (2); TROVER AND CONVERSION (2).

DANGEROUS PLACE—See MASTER AND SERVANT (8).

DEATH—See MASTER AND SERVANT (7, 19).

DEBTOR AND CREDITOR—See CHATTEL MORTGAGES; INJUNCTION (2).

DEEDS.

The owner of realty by virtue of a quitclaim deed stands in no better position than his grantor. *Holmes* v. *Soule*, 526.

See BROKERS (4); EQUITY (2); ESTOPPEL.

DE FACTO JUDGE—See CONSTITUTIONAL LAW (8).

DEFAULT.

In order to obtain a decree in chancery permitting a defendant to open his default in omitting to answer the cross-bill of one of the joint defendants, a sworn answer should have been tendered as provided by Chancery Rule 7, and the application must be made within six months after the entry of default. *Emery* v. *Airth*, 433.

See CORPORATIONS; FRAUD (2).

DEFECT IN PREMISES—See LANDLORD AND TENANT.

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DELAY IN FILING MOTION FOR APPEAL—See JUSTICES OF THE PEACE (1).

DELIVERY—See GIFTS (1); SALES (2).

DEMURRER—See LIMITATION OF ACTIONS (1).

DESCENT AND DISTRIBUTION—See WILLS (8).

DEVISES—See WILLS (8, 11).

DIRECTED VERDICT—See APPEAL AND ERROR (4); CONTRACTS (17, 18); INTOXICATING LIQUORS (3); LIMITATION OF ACTIONS (5); MASTER AND SERVANT (1, 8, 21).

DIRECTORS OF CORPORATION—See CORPORATIONS.

DISCHARGE OF MORTGAGE—See MORTGAGES (1).

DISMISSAL AND NONSUIT—See CANCELLATION OF INSTRUMENTS (2).

DIVORCE.

1. Evidence of a conflicting nature in a suit for divorce based on charges of extreme cruelty, *held*, insufficient to justify a decree, and, if credible, the acts charged were condoned by complainant. *Cadieux* v. *Cadieux*, 99.

2. Although there was testimony in support of the wife's averments and claim that defendant gambled on horses and bought stocks and failed to provide for her maintenance and comfort as fully as her needs required, the proofs were not sufficient to warrant the court in finding that, being of sufficient ability, defendant grossly or wantonly and cruelly refused and neglected to provide suitable maintenance for his wife. *Id.*

3. Evidence of the complainant in divorce proceedings that his wife had been guilty of improper relations with other men prior to her marriage, met by her testimony that the complainant also had illicit relations with her, *held*, by an evenly divided court, to be insufficient to sustain the averments of the bill. *Sylvester* v. *Sylvester*, 512.

DOMESTIC RELATIONS, COURT OF—See CONSTITUTIONAL LAW (4, 8.)

DOWER—See FRAUDS, STATUTE OF (1).

EASEMENTS.

1. Evidence that complainant and other members of the public had used a canal from Lake St. Clair and the Detroit river to and through complainant's premises for many years, that part of it had been improved at the expense of the public and it had been dedicated to the public at the time defendant platted the surrounding land, also, that the stream was the only possible way

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EASEMENTS—Continued.

by which complainant could reach the lake and river from his home, *held*, to justify the court in restraining defendant from obstructing the canal. *Lepire* v. *Klenk*, 481.

2. Where partners owned two store buildings with a stairway between, and, on dissolving partnership, they divided the property into two parcels, reserving to each the use in common of the intervening hall and stairway, they created a mutual easement in the land occupied thereby, so that the use of the premises was permissive, not adverse, and neither party could gain title by adverse possession. *Gates* v. *Sebald*, 578.

EDUCATION, BOARD OF—See PUBLIC OFFICERS.

EJECTMENT.

1. Where plaintiff brought ejectment to recover a strip of land two or more inches in width next to her lot which defendant had occupied with a foundation wall and its footings, it was not a defense to the action that the defendant did not claim to occupy the land adversely and before plaintiff brought action promised to remove the footings of the concrete wall. The court erred in assuming as a part of its instructions that the occupancy was not unlawful if not adverse to plaintiff. *Outhwaite* v. *Gunn*, 66.

2. And a recovery in ejectment is warranted although defendant abandoned his occupancy, if he held possession at the time suit was commenced. *Id.*

3. And under conflicting evidence it was error for the trial court to hold that the footings of defendant's wall did not extend upon plaintiff's land and to determine as matter of law which of the surveys was correct. *Id.*

See ADVERSE POSSESSION (1); EQUITY (3).

ELECTION—See WILLS (5, 6).

ELECTION OF REMEDIES.

Not knowing at the time of commencing an action that defendant had converted money collected for plaintiff to his own use, the plaintiff did not waive her right to amend her declaration from assumpsit to trover, since full knowledge is essential to a claimed waiver. *Hogue* v. *Wells*, 19.

ELECTION OR APPOINTMENT—See PUBLIC OFFICERS (1).

ELECTIONS—See CONSPIRACY.

ELECTRICITY.

Where an electric light and power company was engaged in the production of both light and power, but at different

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ELECTRICITY—Continued.

rates to consumers, and one of its patrons, who obtained current for power in an industrial establishment, by the use of transformers furnished by the complainant, employed the current to produce light without paying the higher rate adopted and published by the company for lighting current, an injunction was properly allowed to restrain defendant from so using the current, since his action operated as a discrimination against the other consumers of electricity for lighting purposes. *Alpena Electric Light Co.* v. *Kline*, 279.

See EQUITY (1).

EMINENT DOMAIN—See COURTS; MUNICIPAL CORPORATIONS (5).

ENTERTAINMENT OF JUROR BY ATTORNEY—See TRIAL (5).

EQUITY.

1. Before raising the question of reasonableness of rates charged by an electric power and light corporation, in a suit in equity involving an alleged discrimination brought about by defendant's purchasing power and transforming the current into a lighting current, the point should be presented to the Michigan railroad commission which is empowered by Act No. 106, Pub. Acts 1909 (2 How. Stat. [2d Ed.] § 2932 *et seq.*), to pass on the question of rates. *Alpena Electric Light Co.* v. *Kline*, 279.

2. Under Act No. 211, Pub. Acts 1905 (1 How. Stat. [2d Ed.] § 2021), making the deed of the State land commissioner *prima facie* evidence of title, a petition for writ of assistance to obtain possession of tax homestead lands purchased by third parties and conveyed to the petitioner, was sufficient without alleging the regularity of the proceedings leading up to the issuance of such deed where the petition showed the due execution and delivery of State deeds and making of a demand on the defendant, who was in possession and to whom the petitioner exhibited the deeds conveying title to him. *Chiodo* v. *Williams*, 367.

3. The trial court correctly held that a writ of possession was the proper remedy to put the purchaser of tax homestead lands in possession, that the action of ejectment was not the sole remedy. 1 Comp. Laws, § 3959, as amended (1 How. Stat. [2d Ed.] § 1911). *Id.*

See ABATEMENT AND REVIVAL; AMENDMENTS (3); CANCELLATION OF INSTRUMENTS (1); DIVORCE (3); ESTATES OF DECEDENTS; GIFTS (3); INJUNCTION (1); LIENS; LIMITATION OF ACTIONS (2); RECEIVERS (1); TAXATION (4, 7).

EQUITY PRACTICE—See DEFAULT.

ESCROWS—See LIENS.

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ESTATES OF DECEDENTS.

No remedy in equity exists in favor of an infant claimant who failed to present her claim against an estate of a decedent before the time for presenting claims had expired under section 9380, 3 Comp. Laws (4 How. Stat. [2d Ed.] § 11091), in the absence of mistake, ignorance, or fraud. *Van Haaren* v. *Tierney*, 192.

See ABATEMENT AND REVIVAL; GIFTS (1, 3, 4); WILLS (8, 10, 11); WITNESSES (5).

ESTOPPEL.

Since a married woman is not held liable on her covenants in a deed executed by herself and husband, in the absence of statutory provisions creating such liability, the wife was not estopped by a joint deed of conveyance with full warranties executed by herself and husband, so as to cut off the estate thereafter vesting in her under the will of the testatrix, and without testimony tending to disclose her purpose in joining in the conveyance, or that the consideration was paid to her, the signature of the wife was a nullity. *Menard* v. *Campbell*, 584.

See MUNICIPAL CORPORATIONS (3); PRINCIPAL AND AGENT (3); WILLS (4).

EVIDENCE.

1. An expert medical witness' opinion, based on the facts stated in the hypothetical question and in part on a physical examination and in part on statements of the plaintiff and of her attending physician, should have been struck out on the motion of defendant's attorney, in a personal injury case. *Beattie* v. *J. L. Hudson Co.*, 111.

2. Defendant's request to charge that the burden of proof rested on plaintiff to show, by a fair preponderance of the evidence, that she had exercised reasonable care and watchfulness to avert if possible a collision, should have been given, in an action for injuries sustained in being run down by a horse, and it was insufficient to state in the charge the rule that plaintiff must exercise reasonable care, etc. *Id.* 112.

3. It was misleading, also, to charge that if the plaintiff and her companion were paying no attention to the passage of vehicles on the street, and, while inattentive, walked carelessly in front of defendant's delivery rig then being driven across the street, as shown by a preponderance of the evidence, plaintiff would be guilty of contributory negligence, since the instruction appears to place the burden of proof on the defendant. *Id.*

4. Testimony of a stenographer, furnished at a sale of land by owner to broker, paid for out of the proceeds, as to matters learned as part of her employment, was admissible in an action by the broker for his commissions and was not

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EVIDENCE—Continued.

subject to the rule of privileged communications. *Sotham* v. *Macomber*, 120.

5. Negotiations prior to the execution of a contract, being merged in the written agreement, the trial court, in an action of assumpsit for extra services performed by plaintiff, correctly excluded correspondence tending to show that the extra items were intended to be covered by the contract; and evidence of a prior conversation was also incompetent. *Hapke* v. *Davidson*, 138.

6. Although bills of lading which were not shown to be genuine were incompetent as evidence of delivery of the freight to the carrier, any error committed in receiving them was cured by the reception in evidence of receipted freight bills covering the same ground and showing the same facts. *Fremont Canning Co.* v. *Pere Marquette R. Co.*, 284.

7. Parol testimony is not competent to vary the plain, unambiguous terms of a writing. *Northwestern Cooperage & Lumber Co.* v. *Rubinsky*, 414.

8. Where it appeared from the proofs that the defendant's title by adverse possession was complete not later than 1897 and in 1907 the claimant entered into a contract to sell the premises, providing that $500 should be deposited in a bank to remain five years unless the cloud on the title was removed before the expiration of the period, the trial court did not commit prejudicial error in refusing to permit the plaintiff's counsel to cross-examine such witness relative to the reason for inserting the five-year limit. *Merritt* v. *Westerman*, 449.

9. On the trial of a contest over decedent's will, which contestants claimed was void for incompetency of the testatrix, an attorney for the contestants who had given testimony tending to show the mental and physical condition of the testatrix at times when he called upon her in relation to a certain proposed compromise of pending or threatened litigation, should have been permitted to answer, on cross-examination, what was his purpose in making the visit and whether he was there at another time. *In re Quinn's Estate*, 502.

10. Having shown all the facts and surrounding circumstances, the plaintiff in a personal injury case was not entitled to have a witness state his opinion as to what caused the wheel of the truck that plaintiff was driving, when his injury occurred, to come off, permitting one side of the vehicle to drop to the pavement. *Riffel* v. *Union Truck Co., Ltd.*, 673.

11. Under the provisions of 1 Comp. Laws, § 3846 (1 How. Stat. [2d Ed.] § 1791), making the sworn statement of a taxpayer received by supervisor or assessor, relative to assessable property privileged, and forbidding the use

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EVIDENCE—Continued.

thereof for any other purpose, it was not erroneous on the trial of an action for converting assets of an estate to receive evidence of statements made orally by decedent to the supervisor as to his personal property subject to assessment; no written statement having been made by the taxpayer. *Pease* v. *Jennings*, 682.

12. On the issue whether defendant received certificates of deposit of decedent as a gift, statements of the testator showing a hostile feeling toward defendant, were not improperly admitted to show the relations between them and a state of feeling inconsistent with the claimed gift. *Id.* 683.

See APPEAL AND ERROR (4); ATTORNEY AND CLIENT (3); AUTOMOBILES (1, 3); BILLS AND NOTES (2); BROKERS (2, 5); CONSPIRACY (3); CONSTITUTIONAL LAW (14); CRIMINAL LAW (2, 3); CUSTOMS AND USAGES (1); DAMAGES (2, 3); EJECTMENT (3); FRAUD (2); GIFTS (1-3); MALICIOUS PROSECUTION (3-6); MASTER AND SERVANT (1, 8, 17, 19-21); MINES AND MINING (1-3); PHYSICIANS AND SURGEONS (1); STREET RAILWAYS (3); TRIAL (4); TROVER AND CONVERSION; WILLS (7).

EXCESSIVE VERDICT—See CARRIERS (4).

EXCHANGE OF REAL PROPERTY—See FRAUD.

EXECUTION.

The court is authorized to permit the sheriff, who has omitted to indorse on a writ of execution the date of its receipt or delivery to him, to make the correction after return *nulla bona*. *Forsythe* v. *Washtenaw Circuit Judge*, 633.

EXECUTORS AND ADMINISTRATORS.

A special administrator of the estate of a decedent can neither maintain actions to recover the possession of lands nor defend suits brought to divest the estate of title. *McLaulin* v. *Wayne Circuit Judge*, 96.

See ESTATES OF DECEDENTS; WITNESSES (3, 5).

EXPERT TESTIMONY—See EVIDENCE (1, 10); MINES AND MINING (1, 2).

EXPLOSIVES—See MASTER AND SERVANT (9).

EXPRESS TRUSTS—See LIMITATION OF ACTIONS (2).

EXTRA SERVICES—See CONTRACTS (1, 3); EVIDENCE (5).

EXTREME CRUELTY—See DIVORCE (1).

FALSE REPRESENTATIONS—See CRIMINAL LAW (2-5); FRAUD.

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FEE—See ATTORNEY AND CLIENT (1); BROKERS (1).

FELLOW-SERVANTS—See MASTER AND SERVANT (3, 6, 23).

FENCES—See BOUNDARIES.

FIDUCIARY RELATIONS—See TROVER AND CONVERSION (1).

FILING MORTGAGE—See CHATTEL MORTGAGES (1).

FIRE INSURANCE—See INSURANCE (1, 4).

FOOT-FRONT RULE—See TAXATION (1).

FRANCHISE—See CONSTITUTIONAL LAW (9, 10).

FRAUD.

1. In an action for deceit and false representations whereby plaintiff was induced to exchange her property for a farm, representations that defendant's farm was worth $4,000, that he had purchased it for that amount, that he had sold the property on a land contract for $4,000, receiving a payment of $1,500, that the buildings were good and the soil productive and the farm was occupied by a family which were cultivating it, being false, sufficiently sustained plaintiff's claim of fraud, and entitled plaintiff to a writ of *capias ad respondendum*. *Merlau* v. *Kalamazoo Circuit Judge*, 393.

2. Nor was the defendant relieved of the consequences of his wrongful act because no default had occurred upon the land contract before plaintiff commenced her action; affidavits establishing that the contract called for nearly three times the actual value of the land tended to show that the plaintiff had been defrauded in the exchange. *Id.*

3. No rescission or restitution is necessary as a condition precedent to an action for damages for fraud and deceit. *Id.*

See CANCELLATION OF INSTRUMENTS (1); CRIMINAL LAW (3); INSURANCE (2, 4, 5); MUNICIPAL CORPORATIONS (8); PRINCIPAL AND AGENT (1).

FRAUDS, STATUTE OF.

1. An oral agreement between four persons who were interested in an estate of a decedent, and who entered into a written contract to buy the dower and homestead rights of the widow, that one of the four should pay $500 and one-fourth of the amount to be given the widow, was not void under the statute of frauds. *Stevens* v. *Jackson*, 131.

2. At most only a presumption existed that the purchasers had equal interests and the presumption was rebuttable. *Id.*

3. Under conflicting testimony relating to the oral agreement, the issue was one for the jury and there was sufficient evidence of consideration to support the contract. *Id.*

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FRAUDS, STATUTE OF—Continued.

4. Where it was claimed by the defendant that services for which plaintiff claimed compensation would be a liability against another party, a corporation, which had been incorporated to take over the factory erected under the agreement, the contention that the action would be barred by the statute of frauds was not tenable. *Hapke* v. *Davidson*, 139.

See CONTRACTS (6, 9).

FRAUDULENT CONVEYANCES.

Evidence that defendant had transferred to his wife his real property and personalty in defraud of his creditors, that she had paid out to satisfy his creditors several amounts, proved by vouchers and undisputed testimony, and that she was entitled to exemptions to be credited to her on an accounting, *held*, to show a balance due of $211.19 for which she should be held liable to a judgment creditor. *Jewell* v. *Kelley*, 61.

FRAUDULENT PROOF OF LOSS—See INSURANCE (4).

FREIGHT—See CARRIERS (1).

FREIGHT CHARGES—See ASSIGNMENTS (2).

GAMBLING—See DIVORCE (2).

GARNISHMENT.

It is a general rule that service of process in garnishment creates a lien on the property of the principal defendant, entitling plaintiff to hold such property for the satisfaction of his claim, and it is so recognized in Wisconsin. *Rickman* v. *Rickman*, 225.

See INJUNCTION.

GENERAL LAWS—See CONSTITUTIONAL LAW (2).

GIFTS.

1. Testimony of a third person that decedent entered the house of his sister, who was then dying, and took a package containing money, saying, in her presence, that they were valuables, and that, at the time, the witness supposed the brother was speaking to him, was insufficient to show a delivery or establish a gift in trust for the benefit of certain persons mentioned in oral instructions of the sister, as alleged by the donee. *Lerche* v. *Kishpaugh*, 617.

2. Evidence of declarations and admissions of a donor are insufficient to establish a gift, and are only competent to corroborate other evidence. *Id.*

3. A letter written by decedent, admitting that his sister, deceased, had given him a certain sum in trust for his brother's wife, to whom he was instructed to pay interest

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GIFTS—Continued.

until the lapse of 24 years, and thereafter to divide it between the minor children of his brother, while possibly binding on the writer, was not such a declaration of trust as to bind the estate of the deceased sister. *Id.*

4. And the fact that the deceased deposited the money in banks in his name and that of his deceased sister, jointly, tended to disprove his contention that there was an absolute transfer in trust, and was in recognition of the rights of the decedent. *Id.*

See EVIDENCE (12).

GOOD FAITH—See BILLS AND NOTES (1, 3); DEEDS; WILLS (5).

GRANDCHILDREN—See WILLS (3).

HEARING—See PARTITION (2).

HEARSAY EVIDENCE—See EVIDENCE (12); MALICIOUS PROSECUTION (4).

HEIRS—See WILLS (8-11).

HIGHWAYS AND STREETS—See AUTOMOBILES (3); STREET RAILWAYS (1, 2).

"HOLDING OUT" PERSON AS AGENT—See PRINCIPAL AND AGENT (3).

HOMESTEADS—See FRAUDS, STATUTE OF (1).

HOMICIDE—See CONSTITUTIONAL LAW (14); CRIMINAL LAW (6); WITNESSES (4).

HUSBAND AND WIFE—See ESTOPPEL; FRAUDULENT CONVEYANCES; WILLS (10); WITNESSES (1).

HYPOTHETICAL QUESTIONS—See EVIDENCE (1); PHYSICIANS AND SURGEONS (1).

IMPLIED CONTRACT—See CONTRACTS (1); FRAUDS, STATUTE OF (4).

INCONSISTENT POSITIONS—See MASTER AND SERVANT (1).

INDORSEMENT ON INFORMATION—See CRIMINAL LAW (1).

INDORSEMENT ON WRIT OF EXECUTION—See EXECUTION.

INDUSTRIAL ACCIDENT BOARD—See APPEAL AND ERROR (3); MASTER AND SERVANT (10, 16).

INFANTS—See ESTATES OF DECEDENTS; WILLS (6).

INJUNCTION.

1. A bill of complaint to enjoin a creditor of an insolvent copartnership, who has garnished funds due to it, from

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INJUNCTION—Continued.

proceeding to enforce his lien, will not lie in behalf of a subsequently appointed receiver. *Rickman* v. *Rickman*, 224.

2. Nor should an injunction be allowed which would deprive creditors of this State of their liens obtained in another, leaving creditors of foreign jurisdictions to exhaust a fund due to the insolvent by suits or garnishment proceedings in their courts. *Id.*

See BOUNDARIES; EASEMENTS; ELECTRICITY; EQUITY (1).

INLAND WATERS—See EASEMENTS (1).

INSOLVENCY—See INJUNCTION; RECEIVERS (1, 6).

INSPECTION—See CONTRACTS (14); MASTER AND SERVANT (14); SALES (2, 3).

INSTRUCTIONS—See ASSAULT; CARRIERS (2); EJECTMENT (1, 3); EVIDENCE (2, 3); MALICIOUS PROSECUTION (6); MINES AND MINING (3, 4); NEGLIGENCE (3); SALES (2); STREET RAILWAYS (2); TRIAL (1, 7, 9).

INSURABLE INTEREST—See INSURANCE (1).

INSURANCE.

1. Evidence that plaintiff, suing to recover insurance on certain lumber, had sold the property but had not been paid in full and that he claimed that the scale as estimated by the buyer was deficient and fraudulent, that he stated the facts to the insurance agent of the defendant who made a personal examination of the lumber and his estimate confirmed plaintiff's claim as to the incorrectness of the vendee's scale, *held*, to support the contention that plaintiff owned an insurable interest, at least in such part of the lumber as had not been scaled or paid for, although the contract of sale provided that title should pass to the buyer upon inspection or payment of any part of the price. *Fuhrman* v. *Sun Insurance Office of London*, 439.

2. It was not necessary to show that plaintiff stated the exact amount which he had been paid on the deal, unless information was asked for by the agent upon that subject. *Id.*

3. Receipt of a portion of the purchase price by the insured after the issuance of his policy did not avoid the policy or effect any change in the title of the property which remained in the possession of the plaintiff. *Id.*

4. Where the insured had stated the facts concerning the sale to the agent of defendant who was present when its adjuster investigated the loss, to whom the plaintiff mentioned only one of the buyers who had contracted to take his lumber, and the plaintiff signed a sworn statement

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INSURANCE—Continued.

regarding his loss, but claimed to have overlooked the omission, there was no injury to the insurer shown which would avoid the policy for fraud. *Id.*

5. Also where the plaintiff claimed that he did not know anything about a false statement contained in a schedule attached to the proofs of loss and denied swearing to it, there was not such a fraudulent statement as would avoid the policy. *Id.* 440.

INTENT—See CONTRACTS (2); CRIMINAL LAW (5); INTOXICATING LIQUORS.

INTEREST.

On error to review a judgment for the price of certain scales which included an excessive amount of interest, the judgment may be entered for the correct amount, which plaintiff's attorney consented to accept, remitting the excess. *Moneyweight Scale Co.* v. *David*, 8.

See MUNICIPAL CORPORATIONS (4).

INTERNATIONAL LAW, PRIVATE—See CONFLICT OF LAWS; CONTRACTS (8); RECEIVERS (4).

INTERPRETATION OF CONTRACTS—See CONTRACTS (2, 17); SALES (1).

INTOXICATING LIQUORS.

1. The statute (2 Comp. Laws, § 5395, 2 How. Stat. [2d Ed.] § 5074), makes it incumbent on one who conducts a saloon for the retailing of intoxicating liquors to keep it closed on Sunday, at his peril. *People* v. *Damskey*, 664.

2. The act of a hotel keeper's son in entering his barroom, run in connection with the hotel, to obtain a wrench on Sunday, the son being married and living away from home but having freedom of access to saloon and hotel, and retaining a key of the saloon, rendered the proprietor liable to criminal prosecution under the statute, since the son was not a trespasser. *Id.*

3. Upon the uncontradicted facts admitted by the respondent, the trial court was justified in charging the jury that he was guilty, permitting the jurors to retire and make up their verdict; no question of intent was involved which raised any issue of fact. *Id.*

See MALICIOUS PROSECUTION (3).

JOINDER OF PARTIES—See PARTIES.

JOINT OBLIGATION—See LIMITATION OF ACTIONS (4).

JOINT OWNERSHIP—See EASEMENTS (2).

JOINT VENTURES—See PARTIES.

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JUDGMENT.

1. A judgment in Wisconsin, based on service of process upon one partner, in proceedings commenced before the appointment of a receiver of the firm assets, bound the receiver, being conclusive on the parties to the action and their privies. *Rickman* v. *Rickman*, 225.

2. The incorrect entry of a judgment in tort as a judgment in assumpsit was open to amendment under 3 Comp. Laws, § 10270 (5 How. Stat. [2d Ed.] § 12971). *Forsythe* v. *Washtenaw Circuit Judge*, 633.

See JUSTICES OF THE PEACE (1); LIMITATION OF ACTIONS (3); WILLS (4).

JUDGMENT CREDITORS' CLAIMS—See INJUNCTION (2).

JURISDICTION—See CONSTITUTIONAL LAW (7); COURTS.

JURY—See INTOXICATING LIQUORS (3); TRIAL (5, 6).

JUSTICES OF THE PEACE.

1. Under the provisions of Act No. 475, Local Acts 1903, providing for appeals from justice's court in Wayne county after the lapse of five days from the date of judgment, it was proper to deny defendant's motion for leave to appeal, upon a showing that the officers of defendant corporation knew a suit had been commenced, and process was regularly served upon the secretary who gave the summons to a subordinate with instructions to hand to the president, the employee failing to carry out the request. *Huddleston* v. *Charles Amos & Co.*, 253.

2. If the affidavit which is required in case of an appeal from justice's court is lost or mislaid, the circuit court may permit another one to be filed upon a sufficient showing that the affidavit was in fact filed. 1 Comp. Laws, § 10276 (5 How. Stat. [2d Ed.] § 12977). *Hyman* v. *Kadrovach*, 370.

3. The court also has authority to permit the appellant to amend the bond given on appeal so as to comply with the statute as to justification by the surety. 1 Comp. Laws, § 922 (5 How. Stat. [2d Ed.] § 12368). *Id.*

See PLEADING (2).

JUVENILE COURTS—See CONSTITUTIONAL LAW (6).

KNOWLEDGE OF DECEDENT—See WITNESSES (3, 5).

LACHES—See TAXATION (8).

LAND CONTRACT—See CONTRACTS (19, 20).

LANDLORD AND TENANT.

A tenant, who relied on the statement of defendant's agent that the floor of the kitchen was safe, was not guilty of contributory negligence, as matter of law, in making use of it, although she had called his attention to its weak-

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LANDLORD AND TENANT—Continued.

ness, and he had promised to make the repair, assuring her at the same time that the floor was not dangerously weak. *Nutter* v. *Colyer*, 107.

See ADVERSE POSSESSION (2).

"LAST CLEAR CHANCE"—See STREET RAILWAYS (4).

LEADING QUESTIONS—See TRIAL (2).

LEGACIES—See WILLS (3).

LEGISLATIVE OR ADMINISTRATIVE ACTION—See PUBLIC OFFICERS (2).

LICENSE TAG—See AUTOMOBILES (1).

LIENS.

Where complainant loaned money to defendants, in reliance upon a deposit in escrow of a deed with complainant, who had charge of the collection of the purchase price to be paid for the property conveyed, and defendants, dealing with the grantee direct, obtained the payment to them of nearly all the amount due, which they invested in real property and later traded the place for another, there was no violation of trust shown which would entitle complainant to a lien upon the realty obtained by the defendants; nor did the transaction fall within the exception to section 8837, 3 Comp. Laws (4 How. Stat. [2d Ed.] § 10677), abolishing resulting trusts except in case of violated trust or wrongfully taking title to lands in the name of the agent or trustee. *Churchill* v. *Howe*, 150.

See ASSIGNMENTS (1, 3); GARNISHMENT; INJUNCTION; MECHANICS' LIENS; PARTNERSHIP; RECEIVERS.

LIGHTING STAIRWAYS—See MASTER AND SERVANT (2).

LIMITATION OF ACTIONS.

1. The statute of limitations as a defense must be pleaded; the objection cannot be raised by a demurrer to the declaration in an action at law. *Township of Forest* v. *American Bonding Co. of Baltimore*, 90.

2. The bar of the statute of limitations does not operate between trustee and *cestui que trust* of an express trust, and no length of time is a bar to an accounting. Time does not run until a repudiation or adverse possession by the trustee with notice on the part of the beneficiary. *Hatt* v. *Green*, 384.

3. Upon the second review of a cause in the Supreme Court a finding in the first appellate proceedings to the effect that there was evidence in support of the plaintiff's contention as to the statute of limitations is conclusive and

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LIMITATION OF ACTIONS—Continued.

will not be reconsidered upon a similar record. *Myers* v. *Erwin*, 469.

4. Payment of part of the indebtedness by one of several joint obligors, without the authorization or consent of one of the others does not interrupt the running of the statute of limitations as to the latter: section 9745, 3 Comp. Laws (5 How. Stat. [2d Ed.] § 14152). *Id.*

5. *Held*, also, that the court should have submitted to the jury the issues raised by the evidence of one of the defendants which tended to show that he had no knowledge of the alleged payments; and it was erroneous to direct a verdict for plaintiff on the theory that the claim was not barred by limitation of time under the statute. *Id.*

6. Act No. 58, Pub. Acts 1907 (1 How. Stat. [2d Ed.] § 1843), imposing a five-year limitation upon the right to attack a tax title, does not affect tax interests purchased prior to its enactment, since the legislative intent to give the act retroactive effect is not made clear. *Holmes* v. *Soule*, 526.

7. As a rule general statutes of limitation must operate uniformly. *Id.* 527.

See AMENDMENTS (1); PLEADING (1); TAXATION (2).

LOCAL ACTS—See CONSTITUTIONAL LAW (1-4); MUNICIPAL CORPORATIONS (5-7).

LUMBER—See INSURANCE (1).

MALICE—See MALICIOUS PROSECUTION (2).

MALICIOUS PROSECUTION.

1. To entitle a plaintiff to recover for malicious prosecution, three things must concur and be established by a preponderance of the evidence: that the prosecution was begun and came to a legal termination in favor of the plaintiff, that the defendant instituted it without probable cause, and that in so doing he was actuated by malicious motives. *Hickey* v. *Schellenbarger*, 548.

2. If there is any evidence in the case tending to prove malice, the question is for the jury to determine whether a malicious motive existed: it may be proved by direct evidence or it may be inferred from circumstances. And where there was evidence of acts of violence committed by the defendant and expressions of ill will, with facts and circumstances in the dealings of the parties from which malice might be inferred, the issue became one of fact for the jury. *Id.*

3. Where the defendant made a complaint before a justice of the peace, charging the plaintiff with selling him a quart of whisky and the plaintiff denied that he sold or furnished a bottle of whisky at the time and place stated, *i. e.*, in a county that had adopted prohibition, defend-

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MALICIOUS PROSECUTION—Continued.

ant's testimony that plaintiff did sell the bottle of whisky as charged, furnished evidence of probable cause for making complaint, but if such testimony was untrue as charged by the plaintiff and as shown by his proofs, there was want of probable cause for the prosecution, and plaintiff's evidence made out a *prima facie* case. *Id.*

4. Evidence offered to show what the witnesses stated in their examination before the justice of the peace was correctly excluded, the testimony was inadmissible to establish the contention that the discharge of plaintiff from custody was erroneous and a miscarriage of justice. *Id.*

5. Proof of other offenses similar to the one with which defendant charged the plaintiff, who was taken into custody for the offense complained of, is not competent, in an action for malicious prosecution, to prove the plaintiff's guilt of the offense for which he was arrested. *Id.* 549.

6. Nor did the court err in charging the jury that evidence of the plaintiff's discharge from arrest was admitted solely to prove the termination of the criminal proceeding and could not be considered as proof of want of probable cause. *Id.*

MALPRACTICE—See PHYSICIANS AND SURGEONS.

MANDAMUS.

The proper remedy to review the refusal of the circuit court to grant an appeal from justice's court after five days have elapsed from the date of judgment, is mandamus, not error; but in the absence of any objection to the form of remedy chosen by appellant the court may pass on the merits of the objections or points sought to be reviewed. *Huddleston* v. *Charles Amos & Co.*, 253.

See PUBLIC OFFICERS (3); WITNESSES (2).

MARRIAGE—See DIVORCE (3); WILLS (11).

MARSHALING ASSETS—See RECEIVERS (3).

MASTER AND SERVANT.

1. Plaintiff's testimony being contradictory, and his stories of the manner of injury irreconcilable, the trial court erred in submitting the issue to the jury, permitting them to guess which story was correct, where under one set of facts plaintiff could not recover. *Mero* v. *Michigan Central R. Co.*, 1.

2. Where an employee who had been cleaning boilers in a ship knew that no other men were present and the lighting system was not working, he assumed the risk of attempting to proceed down the hatchway or steps between decks in the dark after having an opportunity to discover its condition as to darkness. *Id.*

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MASTER AND SERVANT—Continued.

3. An employee of a wood products factory, who was a member of the crew which unloaded logs from cars in the yard and who knew the method employed in doing the work, assumed the risk of any negligence of his co-employees in the crew in failing to chain or bind up a car load of logs from which a portion had been removed, and he could not recover for injuries caused by logs being jarred off the car while it was being switched about. *Hilgbrandt* v. *Oval Wood Dish Co.*, 43.

4. Where plaintiff and other members of the crew were all so situated that they knew how the work was done, and all the operations were apparent and the dangers obvious, plaintiff assumed the risk of the action of his foreman in taking plaintiff from his work of unloading and placing him in charge of the team which moved cars about, part of his duties being to stop the moving cars of logs by means of a block, which, when used, jarred off logs upon him. *Id.*

5. The direction of the foreman, changing plaintiff's work from unloading to driver of a team which transferred the cars from one skidway to another, without warning or advising plaintiff of the hazards of his work, did not effect such a change in employment as that it could be held to have taken plaintiff out of the scope of his employment, where other members of the crew had also been put in charge of the team. *Id.* 44.

6. And the foreman was a fellow-servant of the plaintiff, although he had authority to hire and discharge men. *Id.*

7. Decedent was employed in defendant's mine as a "hitch cutter," making holes to receive timbers set in them to support the wall or overhanging rock. While the men were engaged in the usual work of timbering the roof of a stope in the mine, and making it safe for the miners, part of the rock fell and rolled upon decedent, killing him. It appeared that all the loose rock had been barred down and the place declared safe, everybody there considering it so: and that plaintiff and his coworker had observed the progress of the work and proceeded to cut the hitches as was usual, believing it safe. The miners had been cautioned against working in dangerous places and were at liberty to withdraw or to take all necessary precautions to render the stope safe. *Held*, that the defendant was not charged with the obligation of furnishing decedent with a safe place in which to work so as to make defendant liable for his death. *Andrews* v. *Tamarack Mining Co.*, 72.

8. On a previous trial of the case the superintendent had testified that the overhanging wall often broke and fell when it appeared to be safe, and in the space of a few minutes. The testimony of the witness who had died was not introduced on the second trial. *Held*, that without evidence

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MASTER AND SERVANT—Continued.

to support this contention the case should have been taken from the jury and a verdict directed for defendant. *Id.*

9. Where plaintiff was one of a crew which was sinking a winze in a copper mine, and two of the men worked in the day shift and two at night, and the duty of determining whether or not blasts consisting of several charges of dynamite had fully exploded rested upon the miners, and where it was impossible to tell from the number of explosions, which often occurred simultaneously, whether or not some of the charges remained unexploded, and it appeared from the evidence that the day shift, which preceded plaintiff at the work, had drilled seven holes and had heard two blasts, and they made an examination and believed that all the charges had been fired, but were mistaken, and plaintiff sustained injuries after making an examination of the condition in the pit, and it was not shown what information, in addition to that which plaintiff was able to learn from inspection, could have been given him by the preceding shift, which would have apprised him of the danger, or that more skillful inspectors could have been employed, a verdict should have been directed for the defendant mining corporation. *Conradsen* v. *Osceola Consolidated Mining Co.*, 155.

10. Injuries resulting in the death of an employee, in the factory of defendant, from colliding with another servant while the decedent was running to punch the time clock, a duty imposed by the master, was an industrial accident, within the meaning of Act No. 10, Extra Session 1912 (2 How. Stat. [2d Ed.] § 3939 *et seq.*). *Rayner* v. *Sligh Furniture Co.*, 168.

11. If not the proximate cause of decedent's injuries, the performance of such duty so contributed to the accident as to constitute a concurring cause. *Id.*

12. Where a servant had worked at a saw for seven months and knew the dangers connected with its operation and could offer no explanation why it failed to work properly, except that the board jumped and forced his hand against the teeth, defendant was not liable for failing to warn him of the erratic action of the saw. *Dombrowski* v. *Roe-Stephens Manfg. Co.*, 202.

13. The absence of a spreader on a ripsaw, designed to prevent a fly-back resulting from the material pinching, was not the proximate cause of plaintiff's injury which resulted from a plank jumping up and forcing the operator's hand against the ripsaw. *Id.* 203.

14. A pick is a simple tool, in common use, and no duty to inspect arises if the tool was reasonably fit in the first instance. *Toth* v. *Osceola Mining Co.*, 274.

15. It is matter of common knowledge that, when rock is

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MASTER AND SERVANT—Continued.

struck forcibly with any iron tool, splinters are liable to fly so that an employer is not charged with the duty of warning an experienced miner of the danger. *Id.*

16. Where an employee's eye received an injury from pieces of steel flying from a lathe that he was operating and the eye became infected with gonorrhea with which the employee was afflicted, the loss of his eye, resulting from the disease, did not arise out of and in the course of his employment under the workmen's compensation law. Act No. 10, Special Session 1912 (2 How. Stat. [2d Ed.] § 3939 *et seq.*). *McCoy* v. *Michigan Screw Co.*, 454.

17. The burden of furnishing evidence from which the inference can be legitimately drawn that the injury arose out of and in the course of his employment rests upon the claimant. *Id.*

18. The doctrine that it was the master's obligation to furnish a safe place, applied to the insufficient or defective construction of a raise in defendant's mine, which was not securely timbered or supported and gave way injuring the employee: the duty could not be delegated and as the evidence tended to show that plaintiff had no warning or knowledge of the danger he could not be held to have assumed the risk of the alleged negligence. *Ranta* v. *Newport Mining Co.*, 460.

19. Evidence, in an action for negligence resulting in the death of defendant's brakeman, *held*, insufficient to remove the cause from the field of conjecture as to the manner and cause of decedent's death. *Beach* v. *Michigan Central R. Co.*, 524.

20. Where defendant was accustomed to oil various passageways from one portion of its factory to another, so as to slide articles of furniture readily, and it had been customary to oil the surfaces on Saturday night only, and plaintiff, its night watchman, slipped and fell on a quantity of oil that, in some unexplained manner, had been deposited or spilled on the slide or passageway during the week, not on Saturday pursuant to the alleged custom, there was no evidence of negligence or of notice to defendant sufficient to charge it with liability, no testimony being introduced to show how long the oil had been allowed to remain upon the slide. *Meyer* v. *Grand Rapids Chair Co.*, 604.

21. Where plaintiff was struck by an empty bucket which fell on him while he was employed in the mine of the defendant, and the testimony tended to show that the bucket had been fastened to a lowering device by a knotted chain, although there was no proof that a bolt or key had not been used in fastening the chain, evidence that the use of such bolt or fastener would prevent the loosening of the knot, had a tendency to support the claim of the plaintiff, and under the established rule that the facts

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MASTER AND SERVANT—Continued.

must be considered in the light most favorable to the party against whom it is proposed to direct a verdict, the question should have been left to a jury. *Maki* v. *Isle Royale Copper Co.*, 624.

22. The master is required to furnish a reasonably safe place in which the servant may carry on his work, and to maintain the appliances used in carrying it on in reasonably good repair. *Id.*

23. The duty to ascertain that the chain and hoisting apparatus was safe and properly adjusted was a nondelegable duty of the employer. *Id.*

24. In an action for personal injuries, the plaintiff, a teamster who admitted that he was charged with the duty of inspecting the truck which he drove and with oiling the wheel, assumed any risk of the nut or burr on the axle of the front wheel coming off, a result which was not shown to have occurred because of the flattening of the front axle by use and wear, as claimed by him, although such condition necessitated more frequent oiling. *Riffel* v. *Union Truck Co., Ltd.*, 673.

See APPEAL AND ERROR (1, 3); AUTOMOBILES (1, 2); MINES AND MINING (1-3).

MATTERS EQUALLY WITHIN KNOWLEDGE OF DECEDENT —See WITNESSES (3, 5).

MECHANICS' LIENS.

A lien on the funds due from the county to the general contractor attached when suit was filed in Wisconsin by the subcontractor, and the latter was entitled to proceed with the suits and to hold the money subject to his lien. *Rickman* v. *Rickman*, 225.

See ASSIGNMENTS (1); RECEIVERS (4, 5).

MICHIGAN AGRICULTURAL COLLEGE—See COLLEGES AND UNIVERSITIES (1); CONSTITUTIONAL LAW (11, 12).

MICHIGAN RAILROAD COMMISSION — See ELECTRICITY; EQUITY (1).

MINES AND MINING.

1. On the trial of an action for injuries sustained in the mine of defendant by the giving way of certain timbers supporting a "raise," the opinion of a miner who had been in that line of employment for ten years and upwards and was familiar with the work of constructing raises, that certain timbering was usually done in a way which he described, was properly received in evidence and defendant's objection that he was not qualified to testify to the custom was correctly overruled, defendant not cross-examining the witness and attempting to raise the point by a general objection and where defendant's captain and

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MINES AND MINING—Continued.

foreman testified to similar facts. *Ranta* v. *Newport Mining Co.*, 458.

2. Another witness who gave expert evidence as to the proper method of timbering was also correctly allowed to testify where he had been a miner for a long period and had seen the method of doing similar work and had practical experience. *Id.* 459.

3. Evidence that plaintiff's leg was broken and became shortened as a result of injuries sustained in a mine, that he suffered other serious injuries, that some of them would be permanent to some extent, authorized the admission in evidence of the mortality tables; and it was sufficient to sustain a charge and verdict for future pain and loss of earning power and for future expenses. *Id.*

4. It was also proper for the court to state to the jury the claim of the plaintiff whose testimony supported the instructions. *Id.*

See MASTER AND SERVANT (7, 9, 15, 18, 21-23).

MISREPRESENTATION—See FRAUD.

MITIGATION OF DAMAGES—See DAMAGES (1).

MORTALITY TABLES—See MINES AND MINING (3).

MORTGAGES.

1. In the case of a mortgage for $1,500, which contained the proviso that when the indebtedness of the mortgagors should be reduced to $3,500 the mortgage should be deemed satisfied, the lien was not affected before such reduction, as security for the $1,500 for which it purported to be a lien. *Commercial State Sav. Bank* v. *Stevens*, 35.

2. Where defendants had never made any claim that the mortgage had been satisfied and should be discharged, and the evidence showed only that the total indebtedness had been reduced to about $3,500 and the mortgage had been recognized as in force by a written agreement between the parties, the circuit court was justified in holding that it was not satisfied. *Id.*

3. And an admission of counsel for the complainant in his opening statement that the amount of loans and discounts upon which the defendants were liable had fallen in 1908 below $3,500, not including overdrafts, could not be treated as an admission that the entire indebtedness had been reduced below the amount stated. *Id.*

MOTOR VEHICLE LAW—See AUTOMOBILES (3); NEGLIGENCE (1, 2).

MUNICIPAL CORPORATIONS.

1. If the municipal authorities deem it expedient to build pavement of materially different widths or qualities on

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MUNICIPAL CORPORATIONS—Continued.

the same street, they should provide different assessment rolls in separate districts. *Corby* v. *City of Detroit*, 208.

2. Under 1 Comp. Laws, § 2786 (3 How. Stat. [2d Ed.] § 6005), providing that the assessment roll when confirmed by the village council should become final and conclusive, the action of the common council in confirming an assessment roll which violates the fundamental principles of the statute as to the uniformity or equality of the tax is not final or conclusive. *Id.*

3. In an action to recover back taxes paid under protest for paving, which plaintiff claimed was not of uniform width throughout the tax district, and that he should not be compelled to pay the same assessment as had been levied on property in front of which wider pavement had been built, the principle of estoppel did not preclude plaintiff from recovering a judgment for the excessive amount paid, where he had protested against the method of assessment from the beginning of the levy but did not file a bill to enjoin the improvement. *Id.*

4. Interest and the statutory penalty are chargeable to a taxpayer who did not pay or tender his just proportion of a special assessment for paving purposes until after the return to the county treasurer, several years after the improvement had been made, and in an action to recover a claimed excessive proportion, the fact that for some time the adjustment of the tax between the village and city of Detroit in which the village had been partly included and the village of Grosse Pointe Park was in controversy did not excuse him from paying the same. *Id.* 209.

5. By the enactment of Act No. 541 of the Local Acts of 1903, providing that the city of Detroit should thereafter take private property for public use under the provisions of that statute and no other, it was intended that the proceedings should be instituted under the local act only, and no repealing statute having been afterwards passed, Act No. 149, Pub. Acts 1911 (4 How. Stat. [2d Ed.] §10155 *et seq.*), which did not expressly repeal the act, was not applicable. *City of Detroit* v. *Weil*, 593.

6. There is no presumption of an intention on the part of the legislature to repeal a law to which no reference is made in a subsequent law, unless the intent is clear. Where a statute is enacted for a particular purpose, it is not to be held abrogated by subsequent general legislation, if the intent so to do is not so clear or distinct as to be unavoidable. *Id.*

7. It is within the province of the legislature to say that real estate, alone, shall be the subject of a special assessment, for the reason that special benefits accrue almost exclusively to lands, and under Act No. 541, Local Acts 1903, if the municipal council did not provide a smaller

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MUNICIPAL CORPORATIONS—Continued.

district for purposes of taxation, the entire property of the city must bear the burden. *Id.*

8. The determination of the city legislative body that the entire real estate of the city of Detroit has benefited by a proposed improvement is final, unless fraud can be established or unless there is such a want or absence of benefit accruing to the assessed property as to indicate that the burden amounts to spoliation, not taxation. *Id.*

See AUTOMOBILES (1); CONSTITUTIONAL LAW (9, 10, 13); CONTRACTS (13-15); COURTS; RECEIVERS (4); TAXATION (1).

MUNICIPAL OWNERSHIP—See CONSTITUTIONAL LAW (10).

MURDER—See CRIMINAL LAW (7); WITNESSES (4).

NAVIGABLE WATERS—See EASEMENTS (1).

NEGLIGENCE.

1. Nor was it error to instruct the jury that the driver on approaching the intersection of two streets must have his automobile under control and operate it at such speed as was reasonable and proper and if he failed to do so he was guilty of contributory negligence; that the motor vehicle law forbids the operation of a motor car on a city street at more than 15 miles an hour and failure to observe this rule would be negligence: there was no impropriety in defining the statutory duty of those driving automobiles on the highway. *Westover* v. *Grand Rapids R. Co.*, 374.

2. Violation of the statutory regulation as to speed was negligence *per se* and would bar plaintiff's recovery. *Id.*

3. *Held*, also, that the charge of the court to the effect that the street car ordinarily has the right of way, as modified by an explanation of the duty of the motorman to keep his car under control and check it so as to avert peril to those who are making lawful use of the streets, was not erroneous or misleading. *Id.*

See AMENDMENTS (2); APPEAL AND ERROR (1); AUTOMOBILES (1, 3); CARRIERS (3, 5); CRIMINAL LAW (9); CUSTOMS AND USAGES; EVIDENCE (2, 3, 10); LANDLORD AND TENANT; MASTER AND SERVANT (3, 8, 9, 12-15, 19-24); MINES AND MINING (1); PHYSICIANS AND SURGEONS (1); STREET RAILWAYS (1-4); TRIAL (1).

NEGOTIABLE INSTRUMENTS—See BILLS AND NOTES.

NEW TRIAL—See CRIMINAL LAW (8); TRIAL (5, 6).

NONSUPPORT—See DIVORCE (2).

NOTICE—See ADVERSE POSSESSION; ATTORNEY AND CLIENT (2); BILLS AND NOTES (3); CUSTOMS AND USAGES (1); ELECTION OF REMEDIES; JUSTICES OF THE PEACE (1); LIMITATION OF ACTIONS (5); MASTER AND SERVANT (12, 18, 20); PARTITION (2).

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NOTICE TO REDEEM—See TAXATION (3-5, 7).

OFFER AND ACCEPTANCE—See CONTRACTS (4).

OPENING DEFAULT—See DEFAULT (1).

OPINION EVIDENCE—See EVIDENCE (1, 10); TRIAL (4).

OPPOSITE PARTY—See WITNESSES (3, 5).

ORAL CONTRACT—See FRAUDS, STATUTE OF (1, 3).

ORAL DISPOSITION OF PROPERTY—See WILLS (1).

OTHER OFFENSES—See MALICIOUS PROSECUTION (5).

PAIN AND SUFFERING—See PHYSICIANS AND SURGEONS (3).

PAROL TESTIMONY—See EVIDENCE (5, 7).

PARTIES.

While it appeared that plaintiff and another firm were jointly interested in the shipping and selling of peaches, and plaintiff attended to the buying and loading, the other firm to selling the peaches for one-half the profits, plaintiff was rightly permitted to recover for the failure of defendant railroad company to provide sufficient cars, pursuant to a preliminary order and arrangement with the plaintiff with whom the contract relations for shipping freight were concluded by defendant, the evidence showing, also, that damages were claimed for peaches which the plaintiff was forced to can and in which the other firm was not jointly interested. *Fremont Canning Co.* v. *Pere Marquette R. Co.*, 283.

See SET-OFF AND RECOUPMENT (1); TRUSTS; WILLS (4).

PARTITION.

1. Where three commissioners in partition proceedings met and divided the premises in two portions, directing the parties to whom they allotted the more valuable parcel to pay to the others the sum of $11,000, and the latter objected, claiming that there was a greater difference in value and offering to pay $14,000 which they filed a bond to pay if they might be awarded the more valuable parcel, and where the court referred the proceedings back for further action and it appeared that only two of the three commissioners met and passed on the second report, the other dissenting from the finding of the majority and filing a separate report, the determination of the commissioners should have been set aside because their action was not in conformity with 3 Comp. Laws, § 11040 (5 How. Stat. [2d Ed.] § 13237), requiring the commissioners to act jointly; it was also improper, under the holdings of this court, to proceed without giving the persons interested an opportunity to be heard in the second proceeding. *Tolsma* v. *Tolsma*, 79.

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PARTITION—Continued.

2. Notice of the proceedings of commissioners in partition, to the interested parties, is required: and an opportunity to be present and be heard should be given. *Id.* 80.

PARTNERSHIP.

Service of process on one of the copartners in Wisconsin was sufficient to secure a valid lien on the fund which belonged to the partnership. *Rickman* v. *Rickman*, 225.

See EASEMENTS (2); INJUNCTION (1); JUDGMENT (1); PARTIES; RECEIVERS (1, 2, 5).

PAVEMENTS—See MUNICIPAL CORPORATIONS (1, 3); TAXATION (1).

PAYMENT—See CONTRACTS (20); INSURANCE (3); LIMITATION OF ACTIONS (4, 5); MORTGAGES (2); TROVER AND CONVERSION (1).

PAYMENT, APPLICATION OF—See ASSIGNMENTS (2).

PENALTIES—See MUNICIPAL CORPORATIONS (4).

PERFORMANCE OF CONTRACT—See BROKERS (3); CONTRACTS (12, 16).

PERMANENT INJURIES—See MINES AND MINING (3).

PERMISSIVE USER—See EASEMENTS (2).

PERSONAL INJURIES—See AMENDMENTS (2); APPEAL AND ERROR (1, 3); ASSAULT; AUTOMOBILES (1, 3); CARRIERS (5); CUSTOMS AND USAGES (1); EVIDENCE (1, 2, 10); LANDLORD AND TENANT (1); MASTER AND SERVANT; MINES AND MINING (1, 3); PRINCIPAL AND AGENT (1); STREET RAILWAYS; TRIAL (1).

PHYSICIANS AND SURGEONS.

1. In an action against a physician for malpractice, the trial court did not err in permitting plaintiff's counsel to ask of a medical witness whether the treatment, which plaintiff's evidence disclosed was adopted, was a proper method, although defendant's witnesses denied that such method was used and claimed other treatment was employed, and their claims were not included in the hypothetical question. *Duffy* v. *Charters*, 572.

2. Under plaintiff's declaration, alleging that the defendant neglected to use proper skill and care in setting plaintiff's collar bone and broken clavicle, and failed to bring the ends of the bones in apposition and to employ proper means for placing and keeping them in position so that the shoulder and said bones became deformed, diseased, that the bones were allowed to overlap, etc., evidence that a fibrous union of the bones resulted was not a fatal variance and tended to support the declaration. *Id.*

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PHYSICIANS AND SURGEONS—Continued.

3. Plaintiff was also entitled to recover damages for extra pain and suffering which he may have sustained because of the improper treatment, but he was not entitled to recover for the discomfort and pain which would in any event have resulted from the broken bone under proper treatment. *Id.* 573.

See EVIDENCE (1).

PICK—See MASTER AND SERVANT (14).

PLACE OF ACCEPTANCE OF CONTRACT—See CONTRACTS (7).

PLEADING.

1. The defense that an action on a surety bond for default of the treasurer of a township is barred by limitation of time fixed by the contract, cannot be presented by demurrer to the declaration. *Township of Forest* v. *American Bonding Co. of Baltimore*, 90.

2. In the absence of any demurrer, or objection to the evidence, interposed in justice's court, in an action upon an injunction bond, the declaration, which was based on only one breach, that had been determined by decree in chancery to have taken place, leaving only a question as to the amount of damages, will be *held* sufficient on error. *Millspaugh* v. *Schultz*, 310.

See ELECTION OF REMEDIES; LIMITATION OF ACTIONS (1); PHYSICIANS AND SURGEONS (2).

PLEDGES—See BILLS AND NOTES (3).

POPULATION AS BASIS OF CLASSIFICATION—See CONSTITUTIONAL LAW (3, 5).

POSSESSION OF INSURED PROPERTY—See INSURANCE (3).

POSSESSION OF MORTGAGED CHATTELS — See CHATTEL MORTGAGES.

POSSESSION OF REAL PROPERTY—See ADVERSE POSSESSION (1); CONTRACTS (20); TAXATION (5).

POSTHUMOUS CHILDREN—See WILLS (3).

POWER AND LIGHT—See ELECTRICITY; EQUITY (1).

PRACTICE—See EQUITY (1, 2); MANDAMUS; PUBLIC OFFICERS (3).

PRELIMINARY EXAMINATION — See MALICIOUS PROSECUTION (4).

PRESUMPTIONS—See CONTRACTS (3); FRAUDS, STATUTE OF (2); MASTER AND SERVANT (21); MUNICIPAL CORPORATIONS (6); TAXATION (1).

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PRINCIPAL AND AGENT.

1. Accepting as true plaintiff's evidence and giving it the greatest probative value, it appeared that his eye was injured in the employ of defendant because of a defective condition of its drill, that the medical adviser and legal counsel of its accident insurance company issuing a policy of indemnity insurance against accidents, by false representations as to the condition of plaintiff's eye, procured a release and settlement of his claim for $110 and medical expenses, that, finding his eye was blind and the other eye affected, plaintiff tendered back the amount received and sued for negligent injuries. *Held*, that by adopting the release, pleading it as a defense and having acted on it in other particulars, defendant ratified the fraudulent acts of the insurer's physician and lawyer so as to present an issue of fact whether the release was void for fraud. *Bertha* v. *Regal Motor Car Co.*, 51.

2. It is a well settled rule in this State that the apparent scope of the authority of an agent is to be determined by the acts of the principal and not by the acts of the agent; persons dealing with the agent are bound to inquire into the extent of the agent's authority, not from the agent, but, in the absence of written evidence, from the principal. *Reinforced Concrete Pipe Co.* v. *Boyes*, 609.

3. The act of the principal in introducing the agent as the representative who would look after their part of the work, which included, under the written contract between the parties, only the manufacture of concrete pipe, at the place of construction, did not amount to holding out the representative as a general agent, so as to bind the principal for changes made in the work outside the terms of the contract and extras claimed to have been authorized by the representative. *Id.*

See BROKERS (4); CONTRACTS (5); TROVER AND CONVERSION (1).

PRINCIPAL AND SURETY—See PLEADING (1).

PRIORITY—See RECEIVERS (2-4).

PRIORITY OF LIEN—See GARNISHMENT (1).

PRISONS—See STATES; STATUTES.

PRIVILEGE—See EVIDENCE (4); WITNESSES (1).

PRIVILEGED COMMUNICATIONS—See EVIDENCE (11).

PROBABLE CAUSE—See MALICIOUS PROSECUTION (3).

PROBATE COURTS—See CONSTITUTIONAL LAW (6).

PROCESS—See PARTNERSHIP; WITNESSES (2).

PROCESS, SERVICE OF—See JUSTICES OF THE PEACE (1); PARTNERSHIP.

PROMISE TO REPAIR—See LANDLORD AND TENANT (1).

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PROOFS OF LOSS—See INSURANCE (5).

PROSECUTING ATTORNEY—See CRIMINAL LAW (1).

PROVOCATION—See ASSAULT.

PROXIMATE CAUSE—See MASTER AND SERVANT (11, 13, 16, 19).

PUBLIC IMPROVEMENTS—See MUNICIPAL CORPORATIONS (3); TAXATION (1).

PUBLIC OFFICERS.

1. Where the president of the Bay City school board vetoed the resolution of the board by which it was attempted to remove him from office and appoint a successor, and it appeared that the president had been duly elected and had exercised the veto power conferred upon him by Act No. 514, Local Acts 1903, the board failing to pass the resolution over the veto, such attempted removal and election to the presidency of the board was ineffective and the first elected president remained entitled to the office. *Lichtig* v. *Saginaw Circuit Judge*, 667.
2. The provisions of the above mentioned act that "the president or vice president when acting as president may file with the clerk of the board his objections in writing to any by-law, ordinance, resolution, motion or order of the board within five days," etc., conferred the power upon such presiding officer to veto any action, legislative or administrative, of the board. *Id.* 668.
3. While it is contrary to the practice of the Supreme Court to determine the right to hold office in a mandamus proceeding, an exception is made in this instance because of the pressing nature of the business before the board, and the fact that the president was entitled to the office both *de facto* and *de jure*. *Id.*

See CONSPIRACY (1).

PUBLIC SERVICE CORPORATIONS—See CONSTITUTIONAL LAW (9); ELECTRICITY.

PUBLIC WAY—See EASEMENTS (1).

QUIETING TITLE—See CANCELLATION OF INSTRUMENTS (1); TAXATION (5).

QUITCLAIM DEED—See DEEDS.

RAILROADS—See APPEAL AND ERROR (1); CARRIERS (1, 5); CUSTOMS AND USAGES; EVIDENCE (6); MASTER AND SERVANT (19); PARTIES.

RAPE—See WITNESSES (1, 2).

RATIFICATION—See BROKERS (4); CONTRACTS (19); PRINCIPAL AND AGENT (1).

REAL ESTATE BROKERS—See BROKERS (3, 5).

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REAL PROPERTY—See ABATEMENT AND REVIVAL; BOUNDARIES; CANCELLATION OF INSTRUMENTS (1); EXECUTORS AND ADMINISTRATORS; FRAUDS, STATUTE OF (1); LIENS.

REASONABLE TIME—See CONTRACTS (17, 18).

RECEIPT—See SALES (2).

RECEIVERS.

1. The appointment of a receiver, in proceedings in this State to dissolve and wind up a partnership that was insolvent, did not destroy the effect of a lien or preference obtained in Wisconsin prior to the filing of the bill by a subcontractor of the copartnership: nor did the receiver have the right or authority to take charge of the assets of the firm so affected by the subcontractor's lien, where no proceedings in bankruptcy had been instituted. *Rickman* v. *Rickman*, 224.

2. After the receiver has been appointed, the creditor's right to sequester property by attachment or other method of obtaining priority is suspended. *Id.*

3. Nor was a Michigan creditor in contempt of court for proceeding in a foreign jurisdiction to take judgment, having commenced proceedings to obtain and enforce his lien as a subcontractor on a public building before any receiver had been appointed. *Id.*

4. Where a subcontractor, who provided work, labor, and materials on a county building in the State of Michigan, brought suit in that jurisdiction under Wisconsin statutes, section 3328, authorizing judgment against the county for the amount of the indebtedness due from the principal contractor, he obtained a lien on the funds due from the county to the contractor and was entitled to priority of payment over other creditors who commenced proceedings later to enforce their liens. *Id.*

5. The construction which the courts of Wisconsin place on their statutes should be followed in this State, in proceedings to dissolve a partnership wherein the rights of materialmen and subcontractors, who have obtained prior liens under Wisconsin law upon funds due the partnership, are in question. *Id.* 225.

6. The receiver of a copartnership, appointed in proceedings for voluntary dissolution by mutual consent, was not entitled to possession of the fund, since he takes only the rights of the partnership as affected by claims and liens that would prevail against the firm if it attempted to assert rights to the fund. *Id.*

See INJUNCTION (1); JUDGMENT (1); MECHANICS' LIENS.

RECORD—See JUDGMENT (2).

RECORDER'S COURT OF DETROIT—See COURTS.

REDEMPTION—See TAXATION (3).

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RELEASE—See PRINCIPAL AND AGENT (1).

REPEAL BY IMPLICATION—See STATUTES.

REPORT—See PARTITION (1).

RESCISSION—See FRAUD (3).

RES JUDICATA—See LIMITATION OF ACTIONS (3).

RESULTING TRUST—See LIENS.

REVIVAL—See EXECUTORS AND ADMINISTRATORS.

SAFE APPLIANCES—See MASTER AND SERVANT (22).

SAFE PLACE—See MASTER AND SERVANT (7, 18, 22).

SALE OF INSURED PROPERTY—See INSURANCE (1, 3).

SALES.

1. Under the provisions of a contract of sale of certain scrap, specifying the kinds and prices, railroad weight at the point of shipment to constitute the basis of settlement, evidence that the railroad company weighed the respective kinds of material separately and the weights so found, was conclusive on the buyer. *Northwestern Cooperage & Lumber Co.* v. *Kubinsky*, 413.

2. Where plaintiff copartnership claimed that it offered to deliver a lot of barrels which had been ordered by defendant, and received instructions from defendant to store them, and that after having done so and some time later, defendant's general manager looked over the barrels and indicated his approval or acceptance, an inadvertence of the court in charging the jury and assuming that he accepted the barrels before they were stored was not so prejudicial and erroneous as to require plaintiff's judgment to be reversed. *T. W. Snook & Son* v. *Mt. Clemens Sugar Co.*, 691.

3. Evidence that the general manager was able to select good barrels when he saw them, that he saw them at plaintiff's factory and made no objection, that they were sufficient to comply with the order and that a letter was sent to and received by plaintiffs advising them when defendant would be ready to receive the merchandise ordered, raised an issue of fact as to defendant's waiver of the right to inspect, the testimony tending to show a long delay in completing the contract on defendant's part. *Id.*

See CONTRACTS (5, 11); SET-OFF AND RECOUPMENT (2).

SALOONS—See INTOXICATING LIQUORS (1, 2).

SATISFACTION CONTRACT—See CONTRACTS (16).

SAVING QUESTIONS FOR REVIEW—See APPEAL AND ERROR (2); TRIAL (8).

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SCHOOLS AND SCHOOL DISTRICTS—See PUBLIC OFFICERS.

SCOPE OF AUTHORITY—See PRINCIPAL AND AGENT (2).

SCOPE OF EMPLOYMENT—See MASTER AND SERVANT (4).

SCRAP IRON—See CONTRACTS (11); SALES (1).

SEARCHES AND SEIZURES—See CONSTITUTIONAL LAW (14).

SEQUESTRATION—See RECEIVERS (2).

SERVICE OF PROCESS—See JUSTICES OF THE PEACE (1); PARTNERSHIP (1).

SERVICES—See CONTRACTS (1).

SET-OFF AND RECOUPMENT.

1. An indebtedness to a corporation, of which the defendant in the action was the controlling stockholder, could not be used as an offset against plaintiff's claim for an amount due from the individual. *Hapke* v. *Davidson*, 139.

2. Recoupment will not lie for breach of warranty of an executory contract of sale, under which title was not to pass on delivery but at the completion of the stipulated payments, and until the price has been paid no right of action on the warranty is available. *Moneyweight Scale Co.* v. *David*, 8.

See CONTRACTS (18).

SEWERS—See CONTRACTS (13, 14).

SHERIFFS—See EXECUTION.

SNOW AND ICE—See CARRIERS (5).

SPECIAL ADMINISTRATOR—See EXECUTORS AND ADMINISTRATORS.

SPECIAL ASSESSMENTS—See CONSTITUTIONAL LAW (13); MUNICIPAL CORPORATIONS (7, 8); TAXATION (1).

SPECIAL SERVANT—See AUTOMOBILES (2).

SPEED—See NEGLIGENCE (1, 2).

STAIRWAYS—See EASEMENTS (2).

STATE BOARD OF AGRICULTURE—See COLLEGES AND UNIVERSITIES (1); CONSTITUTIONAL LAW (11).

STATEMENTS OF DECEDENT—See EVIDENCE (11).

STATES.

The State is not liable to Jackson county for costs of a criminal prosecution of one of the inmates of the State prison at Jackson for burning a warehouse of that in-

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STATES—Continued.

stitution. *Board of Sup'rs of the County of Jackson* v. *Board of State Auditors*, 658.

See STATUTES.

STATUTE OF LIMITATIONS—See LIMITATION OF ACTIONS.

STATUTES.

The provisions of Act No. 132, Pub. Acts 1887, that costs of a prosecution of any inmate of the State penal institutions should be paid by the State, were repealed by Act No. 118, Pub. Acts 1893 (5 How. Stat. [2d Ed.] § 15268 *et seq.*), which re-enacted the former statute without including the provision in question and repealed inconsistent acts. *Board of Sup'rs of the County of Jackson* v. *Board of State Auditors*, 658.

See AUTOMOBILES (3); CHAMPERTY AND MAINTENANCE (1); COLLEGES AND UNIVERSITIES (1, 2); CONSTITUTIONAL LAW (1-7, 11-13); CRIMINAL LAW (9); LIMITATION OF ACTIONS (6); MASTER AND SERVANT (10); MUNICIPAL CORPORATIONS (5, 6); PARTITION (1); RECEIVERS (4, 5); TAXATION (3, 6); WILLS (2).

STATUTORY STATEMENTS AS TO ASSESSABLE PROPERTY —See EVIDENCE (11).

STREET RAILWAYS.

1. An ordinarily prudent man in crossing a highway or street car track will be watchful of any vehicle or street car which he may observe approaching, until he has passed the danger point and reached a place of safety: it is the duty of a driver to keep observing an approaching street car sufficiently to enable him to determine the safety of his course. *Westover* v. *Grand Rapids R. Co.*, 373.

2. In an action for wrongful death of a passenger who was killed in an automobile when it attempted to cross the track of a street railway company, the driver claiming that he looked and saw a car but believed he had sufficient time and proceeded to cross the track, the trial court did not err in charging the jury that it was the duty of the driver to observe the speed of the car from the time he first saw it until he went upon the track: merely looking at the car once at a distance was not enough, and the language should be construed to mean that the driver's duty required him to continue his observation sufficiently to enable him to verify the safety of his decision. *Id.*

3. Where plaintiff, on a dark, stormy night, in crossing a street and defendant's tracks, stopped and looked just before he stepped upon the tracks, but saw no car coming and he was struck by a car which carried no headlight, and which did not sound a bell or signal, there was evidence sufficient to present an issue of fact for the jury

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STREET RAILWAYS—Continued.

whether he was in the exercise of ordinary care. *Bady* v. *Detroit United Ry.*, 380.

4. *Held*, also, that the evidence did not sustain plaintiff's claim that defendant's motorman was chargeable with actionable negligence notwithstanding plaintiff's precedent contributory negligence, that defendant's motorman took every possible precaution to avoid the collision after he discovered plaintiff's peril and a verdict for the defendant should have been directed. *Ruscyk* v. *Detroit United Railway*, 399.

See CONSTITUTIONAL LAW (9, 10); NEGLIGENCE (3).

SUBSEQUENT NEGLIGENCE—See AMENDMENTS (2).

SUBSTITUTED SERVICE—See PARTNERSHIP.

SUNDAY—See INTOXICATING LIQUORS (1, 2).

SUNDAY LAW—See CONTRACTS (19, 20).

SUPREME COURT PRACTICE—See APPEAL AND ERROR (1); PUBLIC OFFICERS (3).

SURPRISE—See AMENDMENTS (2).

TAXATION.

1. Where a pavement was constructed in front of plaintiff's property, and an assessment levied on all the property in the district by the front-foot rule, and it was taxed for the same amount as other property in the district, although the pavement was 60 feet wide in a part of the district and only 46 feet wide in front of complainant's land, the presumption that such method of assessment was equitable, which usually prevails, would not apply. *Corby* v. *City of Detroit*, 208.

2. After six months from the date on which deeds to the State of tax homestead lands have been recorded under section 127 of the general tax law, Act No. 107, Pub. Acts 1899 (1 How. Stat. [2d Ed.] § 1898), the owner of the premises is precluded from contesting the validity of the proceedings. *Chiodo* v. *Williams*, 367.

3. The purchaser of a tax interest in real property whose deed has not been placed on record, is not entitled to notice under the statutory provisions for redemption of Act No. 229, Pub. Acts 1897, as amended by Act No. 142, Pub. Acts 1905 (1 How. Stat. [2d Ed.] §§ 1911-1914), to cut off his right of redemption from a subsequent purchase of lands delinquent for taxes. *Heethuis* v. *Kerr*, 520.

4. The fact that a purchaser of such tax title served a defective notice on the persons who were entitled to be notified would not entitle the holder of an unrecorded tax deed, who was not in possession of the premises conveyed, to

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TAXATION—Continued.

redeem: he could not complain of any defects in the notice served on the owners of record. *Id.*

5. By entering into possession of lands under a claim of ownership through certain tax deeds, the grantees did not obtain any rights, if a valid notice to redeem was not served on the proper parties. Service of notice is a condition precedent to the vesting of title in the purchaser. *Holmes* v. *Soule*, 527.

6. Section 73 of Act No. 206, Pub. Acts 1893, providing that no tax sale or deed of the State shall be set aside after the purchaser has been in actual possession for five years has been held to be repealed by implication. *Cook Land, etc., Co.* v. *McDonald*, 155 Mich. 175 (118 N. W. 959). *Id.*

7. Where the holder of a tax title served a notice upon the owner of record, stating the total amount required for the redemption of two parcels, which was therefore defective and insufficient, and where neither party was shown to have been in possession of the land, no equitable relief could be granted to the grantee of the holder of title who did not ask for the right to redeem or offer to pay the amount required. *Id.*

8. Mere delay on the part of the owner to assert his rights against the claimant under a tax title who did nothing in reliance upon the silence of such record owner, is insufficient to confer any right although an insufficient notice to redeem was served. *Id.*

See CONSTITUTIONAL LAW (12); EQUITY (2); EVIDENCE (11); LIMITATION OF ACTIONS (6, 7); MUNICIPAL CORPORATIONS (1-4, 7, 8).

TAX HOMESTEAD LANDS—See EQUITY (2, 3); TAXATION (2).

TAX TITLE—See ADVERSE POSSESSION (2); LIMITATION OF ACTIONS (6).

TELEGRAPHS AND TELEPHONES—See CONTRACTS (6, 8).

TIME—See DEFAULT.

TIME TO PRESENT CLAIMS—See ESTATES OF DECEDENTS.

TORT—See JUDGMENT (2).

"TOWARD"—See CRIMINAL LAW (10).

TOWNSHIPS—See PLEADING (1).

TRESPASSER—See INTOXICATING LIQUORS (2).

TRESPASS VI ET ARMIS—See ASSAULT.

TRIAL.

1. The action of the trial judge, in charging the jury that defendant's absence from the State during a personal in-

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TRIAL—Continued.

jury case was of no consequence, cured any prejudice that may have resulted from questions referring thereto asked by plaintiff's attorney. *Nutter* v. *Colyer*, 107.

2. Where defendant's counsel took several objections to interrogatories of the opposing attorney, which were not ruled upon by the court, any intention to propound improper questions being disclaimed and counsel offering to frame new questions if the ones asked were objectionable, no prejudice warranting a reversal was made to appear. *Id.*

3. Upon the trial of an appeal from justice's court, the statement of plaintiff's attorney that there was a judgment of $200 in the justice's court, which was interrupted by defendant's counsel and which the court told the jury to disregard, was not so prejudicial as to constitute reversible error. *Millspaugh* v. *Schultz*, 310.

4. Where the trial court excluded the opinions of some of the witnesses for proponent in a will contest, but later, after examining into the point, overruled the objection and permitted the witnesses to testify, any prejudice which may have resulted from the original ruling was cured. *In re Dailey's Estate*, 473.

5. Where one of the jurors at the trial of a hotly contested will case was entertained at the house of the attorney for the prevailing party on Thanksgiving day, during the progress of the trial, among the members of a club which had been invited before the trial, and the attorney subsequently retired from participation in the case, but acted as a witness, and the court had warned the jurors not to talk with the parties or their attorneys, it was erroneous to deny proponent's motion for a new trial on the ground of prejudicial influence. *In re Quinn's Estate*, 502.

6. Without reference to the question of the correctness of the verdict, a new trial will, in most cases, be ordered, where a juror has been fed or entertained by the successful party or his counsel during the progress of the trial. *Id.*

7. Any possible prejudice which the defendant may have sustained by plaintiff's attorney's referring to the fact that the plaintiff recovered a judgment in justice's court, was cured on the tria of an appeal by the charge of the court that the jury must disregard the result in the lower court and decide the case upon the evidence presented. *Crawl* v. *Dancer*, 607.

8. Argument of the prosecuting attorney, in the course of which he stated that there were better men now in State prison than the respondent, was not prejudicial error, in the absence of a showing in what connection the statement was made or what propositton the prosecuting attorney was discussing. *People* v. *Kreidler*, 654.

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TRIAL—Continued.

9. Where the accused claimed that it was his companion who fired off the rifle at the time alleged by the prosecution, and the general charge of the court submitted this issue to the jury, instructing them that the elements of the offense must be proved beyond a reasonable doubt, and unless they were satisfied beyond a reasonable doubt that the respondent did fire the rifle, they must acquit him, the instructions were sufficient. *Id.*

See APPEAL AND ERROR (4); CARRIERS (2); CONTRACTS (13); CRIMINAL LAW (6, 7); DAMAGES (3); EVIDENCE (2, 8, 9); LIMITATION OF ACTIONS (5); MALICIOUS PROSECUTION (2); MINES AND MINING (4); TROVER AND CONVERSION (2); WILLS (7).

TROVER AND CONVERSION.

1. Where testimony was introduced tending to prove that plaintiff's agent received a check in payment for a note in his hands, and that the check had been marked paid by the bank on which it was drawn, and where the trial court refused to permit the agent to testify that he received no money or its equivalent for the check, at the trial of an action of trover, and it appeared that the relation between plaintiff and defendant was of a fiduciary character and not that of debtor and creditor, and defendant had the note in his hands for collection, trover was correctly held to be a proper remedy for the unlawful retention of the fund, and the trial court properly excluded the testimony offered to show that the payment by check was not in fact what the transaction, on its face, purported to be. *Hogue* v. *Wells*, 19.

2. Evidence that a sewing machine which defendant's agent was charged with converting had cost a stated sum and testimony comparing the work done by it with the work of a new machine, was admissible, upon the question of damages in trover. *Barbrick* v. *White Sewing Machine Co.*, 535.

See DAMAGES (2); ELECTION OF REMEDIES.

TRUSTS.

At common law a trust without a designated beneficiary who could enforce it was void. *Moore* v. *O'Leary*, 261.

See GIFTS; LIENS; LIMITATION OF ACTIONS (2); WILLS (1, 5, 6).

UNIFORM TAXATION—See CONSTITUTIONAL LAW (13); MUNICIPAL CORPORATIONS (2).

VARIANCE—See PHYSICIANS AND SURGEONS (2).

VENDOR AND PURCHASER—See BROKERS (1, 4); CONTRACTS (19).

VETO—See PUBLIC OFFICERS (1, 2).

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VOLUNTARY BANKRUPTCY—See RECEIVERS (6).

WAIVER—See ELECTION OF REMEDIES; SALES (3).

WARNING AND INSTRUCTING SERVANT—See MASTER AND SERVANT (5, 9, 12, 15, 18).

WARRANTY—See SET-OFF AND RECOUPMENT (2).

WAYNE COUNTY—See CONSTITUTIONAL LAW (7, 8).

WEAPONS—See CRIMINAL LAW (9, 10); TRIAL (9).

WEIGHT OF EVIDENCE—See CARRIERS (4); CONTRACTS (3).

WILLS.

1. A bequest of real and personal property to a person named, to be disposed of by the beneficiary for charitable purposes, as the testatrix had previously orally instructed her, was invalid, for the reason that the disposition of property by testamentary act must be by writing and may not be partly oral, and party in writing. *Moore* v. *O'Leary* 261.

2. Act No. 122, Pub. Acts 1907, as amended by Act No. 125, Pub. Acts 1911 (4 How. Stat. [2d Ed.] §§ 10700, 10701), validating charitable trusts where there is uncertainty or indefiniteness of beneficiaries, does not, however, make an instrument valid, which is insufficient as a testamentary disposition of property. *Id.*

3. Under a will bequeathing to the daughter of testator a stated sum and giving to her children, mentioned by name, the sum of one thousand dollars, a son of the daughter born after the will was executed received no share of the property and took nothing by the will. *Hatt* v. *Green*, 383.

4. Where the grandson was a party to proceedings in which the will was construed and he took no appeal, the decree was binding on him in another suit in which his rights under the will were involved. *Id.*

5. The will having conveyed certain land or its value to decedent's grandchildren at their majority, and the evidence showing that the trustees of his estate paid the eldest his proportionate share when he became of age, they should be held to have elected to keep the lands and treat the appraised value of the realty as a fixed trust fund in their hands to be invested and accounted for to the beneficiaries. *Id.*

6. By dealing with the minors interested in the estate about as the trustees saw fit, stating that a certain sum represented their several shares in the estate and demanding a formal release on payment of that amount, from the infant beneficiaries as they became of age, the trustees must be construed as having elected to retain the real property described in decedent's will at its appraised

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WILLS—Continued.

value subject to the interest of the other devisees and legatees. *Id.*

7. In the trial of a contested will case it was improper to exclude cross-examination of the attorney for contestants which was offered to show decedent's motive for changing her will to the disadvantage of the contestants, because they threatened to commence certain litigation. *In re Quinn's Estate*, 502.

8. A devise to a person for life with remainder over to his heirs does not convey a title to the devisee in fee simple, since the rule of "Shelley's Case" is abolished in Michigan: 3 Comp. Laws, § 8810 (4 How. Stat. [2d Ed.] § 10650); the heirs derive title from the testatrix through the will. *Menard* v. *Campbell*, 583.

9. The word heirs has a technical meaning, and as such describes those who succeed to the ownership of real estate upon the death of the owner. *Id.*

10. Where, by statute, a married woman takes an absolute interest in the real estate of the deceased husband, the word heirs, as employed in a will, properly includes the widow. *Id.* 584.

11. Where no intention appeared on the part of the testatrix to build up an estate in her family, and the will provided for an early final disposition of her estate by sale or absolute devise, except certain property to her sons for life, a devise of a life estate to one son and at his decease to the heirs surviving him in equal shares, vested title in his widow and a surviving child after his death, in equal shares. *Id.*

See ESTOPPEL; EVIDENCE (9); TRIAL (4, 5); WITNESSES (3, 5).

WITNESSES.

1. Where plaintiff claimed that defendant gave the wife of plaintiff intoxicating liquor and made her incapable of resisting, and had sexual relations with her while she was drunk, the wife was not prohibited from giving testimony by 3 Comp. Laws, § 10213 (5 How. Stat. [2d Ed.] § 12857), which makes the testimony of the wife incompetent in an action brought in consequence of adultery; for the wrong charged by plaintiff is not adultery but assault and rape. *Hirdes* v. *Ottawa Circuit Judge*, 321.

2. And it was not erroneous to deny defendant's motion to quash the writ of *capias ad respondendum* issued by plaintiff, based principally on the affidavit of plaintiff's wife, so that a writ of mandamus will not issue to vacate such order. *Id.*

3. An administrator with will annexed, who appeared in a contest over the will as a party to the cause only by virtue of his interest as administrator of the estate but

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WITNESSES—Continued.

was not a proponent of the will, was not an opposite party as to the contestants within the meaning of 3 Comp. Laws, § 10212 (5 How. Stat. [2d Ed.] § 12856), excluding testimony of the opposite party as to matters equally within the knowledge of decedent. It was error to exclude questions of contestant's counsel what the administrator saw and heard in an interview with the testator who was a near neighbor of the administrator and had known him well for 42 years. *In re Dailey's Estate*, 473.

4. A respondent that took the witness stand in his own behalf, in a prosecution for the killing of a police officer, might be asked whether he had had trouble with the officers of the city at other times, as a preliminary to an inquiry into the matter of previous convictions. *People* v. *Cona*, 641.

5. The testimony of children of a deceased son who, under the will, took their father's part of the property of the estate bequeathed, were not opposite parties whose testimony was excluded by 3 Comp. Laws, § 10212 (5 How. Stat. [2d Ed.] § 12856), relating to matters equally within the knowledge of decedent. *Pease* v. *Jennings*, 683.

See CONSTITUTIONAL LAW (14); CRIMINAL LAW (1); EVIDENCE (9); MALICIOUS PROSECUTION (4); MINES AND MINING (1); TRIAL (1).

WORDS AND PHRASES—See CONSPIRACY (2); CONTRACTS (11); CRIMINAL LAW (10); CUSTOMS AND USAGES (2); WILLS (9).

WRIT OF ASSISTANCE—See EQUITY (2).

WRIT OF POSSESSION—See EQUITY (3).

WRITTEN CONTRACT—See EVIDENCE (5-7).

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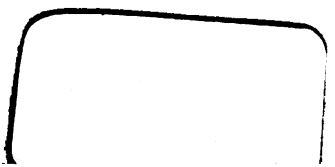

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